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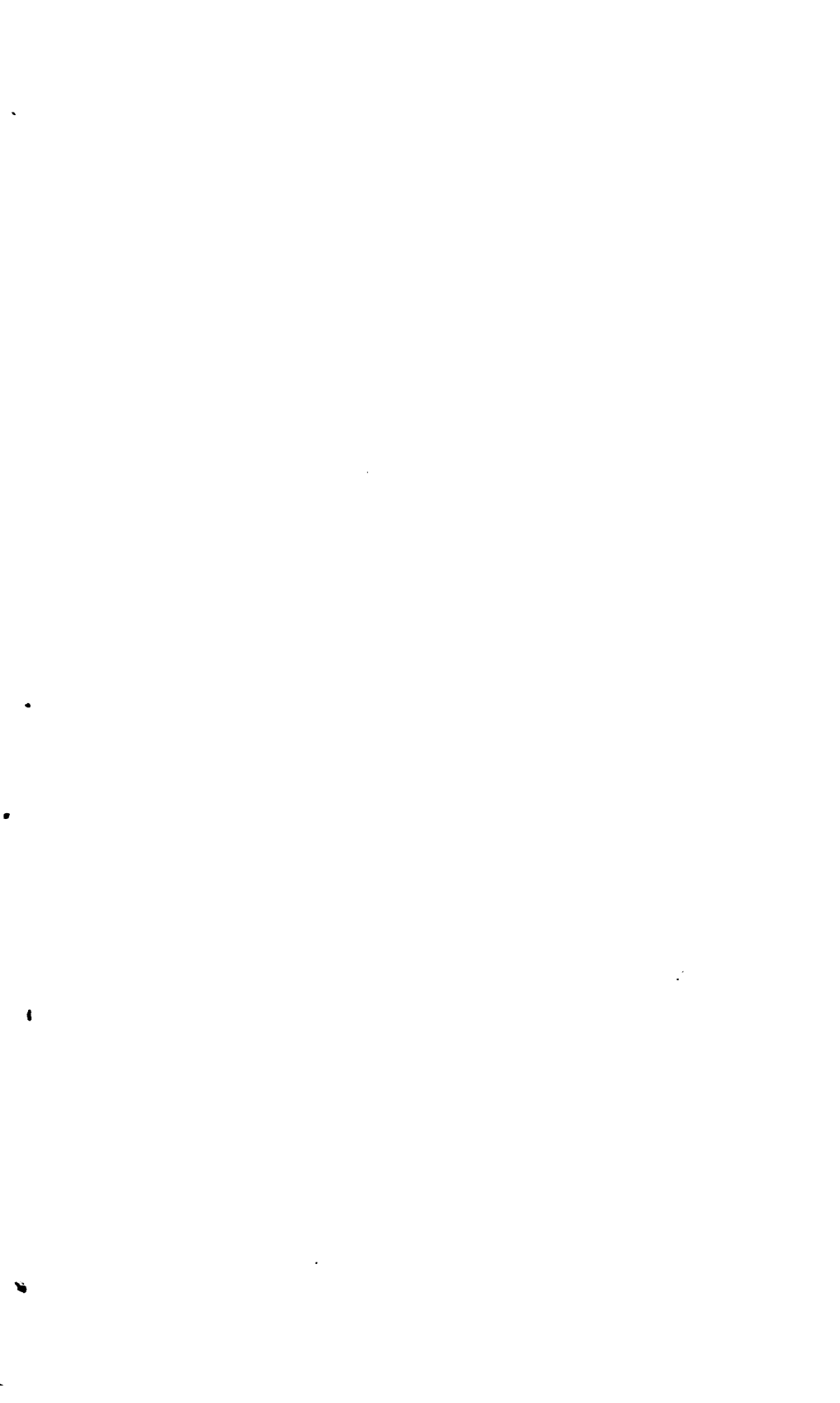
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HOWARD'S

PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

BY R. M. STOVER,
REPORTER.

VOLUME LVI.

ALBANY:
WILLIAM GOULD & SON,
LAW BOOKSELLERS AND PUBLISHERS.
1879.

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THE ARGUS COMPANY,
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ALBANY, N. Y.

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PRACTICE REPORTS.

SUPREME COURT.

In the Application of ANDREW F. PAULMIER agt. JOHN A. SWEENEY and WILLIAM H. SWEENEY.

Examination of parties before suit brought — Code of Civil Procedure § 870

The eight hundred and seventieth section of the Code of Civil Procedure does not provide for the examination of parties before suit brought, on application of a party merely stating that he expected to bring an action against them, and that such an examination was necessary in order to frame a complaint in the action which he contemplated.

This section only provides for the examination of an expected party when *he himself* applies for it, and not for the examination of a party not yet sued, at the instance of another, who contemplates a suit against the former.

Special Term, October, 1878.

MOTION by the Messrs. Sweeney to set aside an order for their examination, obtained by Paulmier, before suit brought.

Amos G. Hull, for motion.

Elliott F. Shepard, opposed.

WESTBROOK, J. — An order was made to examine John A. Sweeney and William H. Sweeney, upon the application of Andrew F. Paulmier, he stating that he expected to bring an action against them, and that such an examination was necessary in order to frame a complaint in the action which he contemplated. The question which the motion presents is,

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does the eight hundred and seventieth section of the Code provide for such an examination?

As amended by chapter 299 of the Laws of 1878, the section (870) of the Code, to which reference has been made, reads as follows: "The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court, other than a court specified in subdivisions sixteenth, seventeenth, eighteenth, or nineteenth of section 2 of this act, may be taken, at his own instance or at the instance of an adverse party or of a complainant or codefendant, at any time before the trial, as prescribed in this article." It will be observed that provision is made to examine two classes of individuals, and no others. He who is ordered to be examined must be either "a party to an action," or "a person who expects to be a party to an action." If he belongs to either class, he may be so examined "at his own instance or at the instance of an adverse party or of a complainant or codefendant." As no action is pending between these parties, the applicant for the order was required to prove that each of the individuals ordered to be examined was "a person who expects to be a party to an action." This was not attempted to be shown, but the allegation is that the applicant for the order expects to sue them. Giving, then, to the Code the meaning claimed for it by the counsel who seeks to uphold the order, that provision has been made to examine a person who some one expects to sue, and that such examination can be had at the instance of the intended prosecutor, the objection still remains that the section provides that if the individual to be examined is not "a party to an action" he must be "a person who expects to be a party to an action about to be brought," and that the affidavit upon which the order for the present examination was obtained makes no attempt to show, because it is nowhere therein alleged or claimed that the parties to be examined have any such expectation. It is manifest, however, as an expectation entertained by an individual can only be proven

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by himself, that provision is only made for the examination of an expected party when he himself applies for it, and not for the examination of a party not yet sued, at the instance of another, who contemplates a suit against the former. Neither is the expression "adverse party" at whose instance the order for examination must be procured, when not obtained by one for the purpose of taking his own evidence, especially when it is followed by the words "complainant or codefendant," which are clearly indicative of its meaning, applicable to an individual not yet "a party to an action." Possibly, depending upon its connection, it might sometimes have such a signification; but in the section under consideration as the word "party" is previously used to designate an individual already connected as such with a pending suit, whilst the one not so circumstanced is styled a "person," it is evident that it is used in its technical legal sense to designate him who is the "adverse party" to the "party in an action."

The views expressed, which are founded upon the words used, are strengthened by the absence of any language directly covering a case like the present, and also from the consequences flowing from a contrary construction. If provision was intended to be made for the examination of a person who some one else expected to sue, it was easy to say so clearly, by declaring that such examination could be had at the instance of an expected adverse party, as well as at the instance of one who already actually was "an adverse party." The addition of the simple words we have suggested, preceded by the conjunction *or*, would probably have accomplished the object, though it might be difficult for one man to prove that another expected to be prosecuted, which the language would still require, and the whole section would thereby be made awkward. The framer, it is to be presumed, understood this as well as the court. Had those words been added, or any clearly providing for an examination in a case like the present, he knew that individuals might be subjected to great annoyance and expense by examination at the instance of persons who

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really did not know whether they would bring a suit or not, or that the person sought to be examined expected one to be brought, but who would, nevertheless, so torture their desires and hopes, to find out the materials for an action by the examination, as to make a sworn declaration which would bring them within the provisions of the statute.

Such inquisitorial power we cannot think was intended to be conferred, and if it was, it should have been so clearly expressed and declared as to leave no room for criticism.

The motion to set aside the order of examination is granted, without costs, as the question is novel, and the court by granting the original order fell into the error now corrected.

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N. Y. SUPERIOR COURT.

In the Matter of the Application of AUGUST J. CHRISTERN, HEINRICH WEINBERGER, and ARNOLD GEISEMANN, to perfect the record of proceedings admitting them to citizenship of the United States.

Naturalization — Admission of alien to citizenship — Jurisdiction — Duty of clerk of court as to record of judgment, admitting to citizenship.

The superior court of the city of New York has power and jurisdiction to entertain and grant an application, to have a record of the proceedings in such court, admitting the applicants to citizenship of the United States, perfected by an entry *nunc pro tunc* of the fact of such admission in the minute book of the court, provided a proper case has been made out for its exercise.

As a general rule the court will not permit a party to suffer through any delay or mistake of its own, nor by the delay or mistake of its officers. It is only when the rights of third persons which have in the meantime been acquired in good faith intervene, that relief will not be given; but even such third persons cannot rely upon a mere technical error which leaves no doubt about what was intended.

In the admission of aliens to citizenship, the only record required to be kept by the court, where the application is made, and the certificate of citizenship issued, is a record showing the declaration of intention, the oath to support the Constitution of the United States, and the renunciation of the foreign jurisdiction and title or order of nobility.

No provision is made as to how the judge presiding over the court should proceed to satisfy himself of the fulfillment of the conditions prescribed, and no provision is made for the preservation of the oral proofs to be given or the attestation of the adjudication to be made, or for the entry of the fact of such adjudication in any book. In the absence of statutory regulations upon the subject, the extent and manner of keeping the record of court proceedings, is left very much to the sound discretion of the court.

Where it is shown by the applicant, that on full preliminary requirements of the statutes of the United States, he duly applied in open court to be

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admitted a citizen of the United States; that he took the requisite oaths, and and supported his application by the necessary and to the court satisfactory proof; that the court gave judgment to admit to citizenship, and that the officiating judge signified his "flat" to that effect to the clerk of the court, to the applicant and to all whom it might concern, by superscribing the initials of his name upon the written and oath attested proofs in the case, and delivered the same to the clerk to do thereupon and therewith all that the law required; that the clerk then and there, in pursuance of such judgment and fiat duly administered, and the applicant duly took and subscribed, the oath commonly called the oath of allegiance; and that thereupon the clerk issued to the applicant, under the seal of the court, a certificate as evidence of the fact of the adjudication made; that the clerk then indorsed and filed the papers and fiat among the court records, as a part thereof, and entered the name of the applicant and other facts connected with the application in a book of index of naturalization records, which is one of several books of like character, regularly kept and permanently preserved among the records of said clerk's office:

Held, that, the clerk, in the performance of the duties assigned to him in these proceedings, was guilty of no omission, which rendered the record, as made up by him, invalid.

When the presiding judge, on giving judgment admitting the applicant to citizenship, attested the fact thereof by affixing his initials to the preliminary proofs, and delivered the papers so attested to the clerk with the direction, express or implied, to do all that remained to be done, the judicial function was completed, and only ministerial acts remained to be done; and the papers so handed over, together with the oath of allegiance thereupon administered, became the judgment record of the court on being filed as such by the clerk and by reason of such filing. The record thus made up constituted a sufficient memorial or remembrance within the requirements of the common law.

If it be deemed of importance that an entry should be made in some book, the entries contained in the books marked "Naturalization Index" and "Naturalization Record" fully answer every requirement that can be made in that respect.

Special Term, October, 1878.

Algernon S. Sullivan, Esq., appeared and argued in support of the motions.

FREEDMAN, *J.* — The object of these applications is to have the record of the proceedings in this court, admitting the

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applicants to citizenship of the United States, perfected by an entry *nunc pro tunc*, of the fact of such admission in the minute book of the court. Each of the applicants applies separately in his own behalf, and shows under oath, among other things, the following facts: That on full preliminary requirements with the statutes of the United States, he duly applied in open court to be admitted a citizen of the United States; that he took the requisite oaths and supported his application by the necessary and to the court satisfactory proof; that the court gave judgment to admit to citizenship, and that the officiating judge signified his "fiat" to that effect to the clerk of the court, to the applicant and to all whom it might concern, by superscribing the initials of his name upon the written and oath-attested proofs in the case, and delivered the same to the clerk to do thereupon and therewith all that the law required; that the clerk then and there, in pursuance of such judgment and fiat duly administered, and the applicant duly took and subscribed, the oath commonly called the oath of allegiance; and that thereupon the clerk issued to the applicant, under the seal of the court, a certificate as evidence of the fact of the adjudication made; that the clerk then indorsed and filed the papers and fiat among the court records, as a part thereof, and entered the name of the applicant and other facts connected with the application in a book of index of naturalization records, which is one of several books of like character, regularly kept and permanently preserved, among the records of said clerk's office; that the applicant has always believed, and been advised, that the proceedings and judgment above recited duly admitted him to citizenship of the United States, but that recently the supervisor in chief of elections in this district, claiming to act under the acts of congress relative to the supervision of elections (*R. S. of the U. S., secs. 2002 - 2031*), and the punishment of crimes against the naturalization laws (*secs. 5424-5429*), has denied the validity of such admission and threatened to subject the applicant to criminal prosecution if he should attempt to vote at

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the next election, and that the only ground of such denial and threat is that there is no legal record of the judgment admitting to citizenship, for the reason that the clerk did not write out an entry in the minute book of the court reciting the proceeding and showing the adjudication made. The facts so far referred to are common to the three applications. They differ only in the following particulars: August J. Christern was admitted on the 15th of September, 1868, at a term of this court held by judge JONES, and Heinrich Weinberger on the 9th of October, 1868, at a term held by judge GARVIN. Their respective applications were made and granted in accordance with section 21 of an act passed at the second session of the thirty-seventh congress, entitled "an act to define the pay and emoluments for certain officers of the army and for other purposes." Arnold Geisemann was also admitted during the October term of 1868, but his application was founded upon his prior declaration of intention to become a citizen, which he had made and filed in this court on the 6th day of June, 1853. As an additional fact Heinrich Weinberger shows that the said supervisor of elections retains in his possession the certificate of citizenship issued to Weinberger by this court.

The questions arising upon the motions before me are of such great importance that I should have been glad to hear the district attorney of the United States for the southern district of New York or the supervisor-in-chief in opposition. I am assured that they were both courteously requested to appear and present their views, but that they declined on the ground that they could not do so consistently with their obligations. I exceedingly regret that they arrived at this conclusion, because in the decision of the questions involved no conflict can arise between state and federal jurisdiction. True, in providing for a uniform rule of naturalization pursuant to the Constitution of the United States, congress adopted, among others, the courts of record of the several states having common law jurisdiction and a seal and clerk, as agents to exercise the power to admit aliens to citizenship. But in exercising this

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power the said courts act exclusively under the laws of the United States, and hence are to be deemed *quoad hoc* courts of the United States. The concurrence of the legislatures of the states, expressed or fairly implied, merely adds the sanction of the state to this delegation of power (*Ramsden's Case*, 13 *How. Pr. R.*, 429; *The People agt. Sweetman*, 3 *Park. Cr. R.*, 358). In the absence, therefore, of the benefit which I might have derived from an argument in opposition, I felt it to be my duty to thoroughly examine for myself the grounds of the several motions and all questions arising thereon. In this I have been greatly assisted by the timely suggestions and extensive researches of the learned counsel who appeared in support of the motions.

The prayer of the motions being, in substance, that a certain defect which is assumed to exist be cured by amendment of the record *nunc pro tunc*, the first question that presents itself relates to the power of the court to entertain the application.

Section 5328 of the Revised Statutes of the United States expressly provides that nothing contained in the title, of which sections 5424-5429, relating to the punishment of crimes against the naturalization laws, form a part, shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof. Under the statutes of the state of New York this court possesses ample power to entertain a similar motion in any action or proceeding which arose under the laws of the state. But as in matters of naturalization the court acts exclusively under the laws of the United States, it may be doubted whether powers conferred by the statute law of the state can be invoked. On the other hand, no restriction upon the power to amend can be found in any act of congress. From this it follows that the power exists, if it exists at common law, and that it may be exercised by every court which is at liberty to exercise it under the common law. This court belongs to that class of courts, and the existence at common law of the power to amend has been distinctly affirmed in

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Weed agt. *Saratoga and Schenectady Railroad Company* (19 *Wend.*, 534) and *Leetch* agt. *Atlantic Mutual Insurance Company* (4 *Daly*, 518). In those cases it was held that every court of record has power to allow amendments on equitable grounds in every species of action independently of the terms of statutes. In general any court of record, unless restricted by statute, may grant an amendment of any proceeding within its jurisdiction. This is a power inherent in the court, and its existence is just as necessary for the purpose of administering justice as the power of the court to vacate its process, order or judgment to prevent an abuse thereof. Moreover, the Revised Statutes of the United States expressly provide:

Section 954. "No summons, writ, declaration, return, process, judgment or other proceedings in civil causes in any court of the United States shall be abated, arrested, quashed or reversed for any defect or want of form, but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which in cases of demurrer, the party demurring specially sets down together with his demurrer as the cause thereof, and such court shall amend every such defect and want of form other than those which the party demurring so expresses, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion and by its rules prescribe."

This grant of power, given in a plenary form, is but declaratory of the principles as they exist at common law. I therefore have no doubt of the existence of the power and jurisdiction to entertain the application and to grant it, provided a proper case has been made out for its exercise. As a general rule the court will not permit a party to suffer through any delay or mistake of its own (*Clapp* agt. *Graves*, 2 *Hilt.*, 317), nor by the delay or mistakes of its officers (*Chichester* agt. *Cande*, 3 *Cow.*, 39; *Neele* agt. *Berryhill*, 4 *How.*, 16; *King* agt. *Harris*, 34 *N. Y. [7 Tiff.]*, 330; *S. C.*, 30 *Barb.*,

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471; *Mechanics' Bank* agt. *Minthorne*, 19 *Johns.*, 244). It is only when the rights of third persons, which have in the meantime been acquired in good faith, intervene that relief will not be given; but even such third persons cannot rely upon a mere technical error which leaves no doubt about what was intended (*Close* agt. *Gillespy*, 3 *Johns.*, 526).

The question, therefore, remains whether the clerk did omit to do any thing in the premises that the law required him to do, and, if so, whether such omission is of sufficient importance to call for a perfection of the record.

The determination of this question involves the construction of the act of congress in regard to the naturalization of aliens, in force at the time of the admission of the present applicants, and a review of the course and practice of this court in acting under the same. The act of 1802 prescribed as conditions of naturalization that the applicant should have declared, two years at least before his admission, his intention to become a citizen of the United States (*sec. 1, subd. 1*), and that at the time of his application he should swear to support the Constitution of the United States and renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, &c., &c. (*sec 1, subd. 2*), and that such proceedings should be recorded by the clerk (*Sec. 1, subd. 2*). In case the applicant bore any hereditary title or was of any of the orders of nobility in the kingdom or state from which he came, he was, in addition, required to make an express renunciation of such title or order of nobility, and this renunciation had to be recorded in the said court (*Sec. 1, subd. 4*). It was also provided that the court admitting such alien should be satisfied that he resided within the United States five years at least, &c., &c., and that during that time he behaved as a man of good moral character, &c., &c. (*Sec. 1, subd. 3*). The second section of the same act which prescribed a form for the registry of aliens desirous of becoming citizens of the United States had been repealed by the act of May 24, 1828. The third section prescribed that every court of record in any

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individual state having common-law jurisdiction and a seal and clerk or prothonotary should be considered as a district court within the meaning of said act, and every alien who might have been naturalized in any such court should enjoy the same rights and privileges as if he had been naturalized in a district or circuit court of the United States. By the act of July 17, 1862, it was further provided that any alien of the age of twenty-one years and upward showing an honorable discharge from the army of the United States, a residence of one year within the United States previous to his application, and a good moral character, should be admitted upon proof of these facts and without any previous declaration of his intention to become a citizen.

These are all the provisions in force, in the year 1868, which it will be necessary to consider. They have since that time been incorporated, without material change, into the Revised Statutes of the United States. From them it will be seen that the only record required to be kept is a record showing the declaration of intention, the oath to support the Constitution of the United States and the renunciation of the foreign jurisdiction and title or order of nobility. No provision existed then or exists now, except as above stated, as to how the judge presiding over the court should proceed to satisfy himself of the fulfillment of the conditions prescribed, and no provision was made for the preservation of the oral proofs to be given or the attestation of the adjudication to be made, or for the entry of the fact of such adjudication in any book. Of course courts do, and necessarily must, keep some record of their proceedings. But in the absence of statutory regulations upon the subject the extent and manner of keeping it is left very much to their sound discretion.

What, then, constitutes a record? "A record," says Coke upon Littleton (260, a), "is a memorial or remembrance in rolls of parchment of the proceedings and acts of a court of justice which hath power to hold plea, according to the course of the common law, of real or mixed actions, &c., &c. * * *

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During the term wherein any judicial act is done the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term as the judge shall direct," &c., &c.

In the course of time rolls of parchment fell into disuse and the usage sprang up of keeping a memorial or remembrance of the proceedings in a book which was finally designated as the "minute book." But this book is a thing of very modern date. In it the clerk keeps a brief account of the proceedings of the court, but such account is never verified or attested by the signature of the judge. It is not, however, the only form of preserving a memorial or remembrance of the proceedings and acts of a court, nor is it the most satisfactory or trustworthy, because it rests entirely upon the intelligence and fidelity of the subordinate clerk who happens to have the charge of it. An order bearing the signature or the initials of the presiding judge must necessarily be at all times more satisfactory and trustworthy. It was therefore held in *The Mayor, &c., of Ludlow and Charlton* (9 C. & P., 242) that a document delivered out by the registrar of the court of chancery as the order of the court is the original order, and that to make it evidence it was not necessary that it should be compared with any book of the orders of the clerk. From all this it follows that the form of the judgment record showing the admission of an alien to citizenship, so far as no express provision for it is made by act of congress, is utterly immaterial. As long as it constitutes a memorial or remembrance of the adjudication made it is sufficient. Thus, in *Spratt agt. Spratt* (4 Peters [United States Reports], 406), chief justice MARSHALL held: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and like every other judgment to be complete evi-

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dence of its own validity. The inconvenience which might arise from this principle has been pressed upon the court, but the inconvenience might be still greater if the opposite opinion be established." In *McCarthy* agt. *Marsh* (5 *New York*, 263) this decision was held by the court of appeals to be a binding authority upon all the state courts, and hence that court, against the able argument of Charles O'Connor to the contrary, came to the conclusion that the entry in the minutes of the court reciting the compliance of the applicant with the requirements of the law and showing his admission contained every thing necessary to constitute the entire record of his admission as a citizen; that it was unnecessary for the plaintiff to give evidence in support of the fact recited, and incompetent for the defendant to contradict it, unless by matter of record importing equal verity; and that without such contradiction the record was conclusive. In coming to this conclusion the prior case of *Ritchie* agt. *Putnam* (13 *Wend.*, 534) was approvingly referred to by RUGGLES, chief justice, in which the supreme court, on the authority of 7 Cranch, 420, had held that it need not appear by the record that all the preliminary requisites to a naturalization had been complied with, but that the judgment of the court admitting the alien to become a citizen is conclusive evidence upon that point. And in coming to the same conclusion Foot, J., expressed the following views, viz. :

All courts look with favor on proceedings to admit aliens to citizenship, and it is just that they should, for the want of acquaintance with our laws and judicial proceedings, the unsettledness of their residences in general for some years and the consequent liability to lose their documents and papers, should shield them from technical and sharp objections to their naturalization papers whenever there appears to have been an honest intention to become a citizen and comply with the laws of our country.

Of course in deciding simply in favor of the sufficiency of

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an entry in the minutes the court of appeals did not decide that the record could not be made in some other way.

It will now be proper to observe the course and practice followed by the superior court of the city of New York in matters of naturalization. Prior to 1858 the preliminary proofs and the oath of allegiance of the applicants were in many, if not in most, cases written out by the clerk and kept upon loose sheets of paper. The declarations of intention, however, were, since November, 1846, kept in a separate book. These loose papers were filed away, after the action of the court upon them, as of the date of the respective applications and kept in the office of the clerk in the same manner as other records were preserved. In passing upon each application the judge holding the court neither signed the papers, nor did he affix his initials, but the clerk was required to note the fact of the judgment of admission by an entry in the minutes. Up to 1858 these entries were made in the minutes; but in that year, no doubt in consequence of the large increase in the number of applications, the practice was changed. Printed blanks came into general use for making the preliminary proofs and taking the oath of allegiance. If the applicant and his witness, after having been duly sworn to make true answers, answered all questions put to them to the satisfaction of the court, the presiding judge, on admitting the applicant to citizenship, signified the fact of having made such adjudication by affixing the initials of his name to the application, and thereupon handed the papers to the clerk, with directions to do whatever might remain to be done; the clerk then, in pursuance of such adjudication, fiat and directions, administered, and the applicant in open court took, the oath of allegiance, and a certificate was given to the applicant as evidence of the fact of his admission. The papers containing the fiat of the presiding judge, as aforesaid, were thereupon indorsed and filed among the records of the court as a part thereof, and marked filed as of the date of the respective application. An entry was also made in a book, kept in

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alphabetical order, showing the date of the admission, the name of the applicant, his nationality, the name of his witness and the residence of such witness, and if the admission was ordered without a previous declaration of intention, either on a discharge from the army or on the ground that the applicant had arrived in this country during his minority, such fact was specially alluded to. As often as necessary a new book of like character was opened upon the same plan. All the books thus kept were permanently preserved among the records of the court. The first thus opened and kept bears upon the outside the simple title or label "Naturalization." The one next in order of time is labeled "Naturalization Index." Those opened since October 16, 1868, bear the title "Naturalization Record." The practice, however, of making an entry in the regular minute book was discontinued. The course and practice as now detailed was observed by the court for the following fifteen years, and under it the promovents now before the court were admitted in 1868.

Now the files and records of this court distinctly show that the said applicants duly complied with all the requirements of the law to be performed on their part, and that all the allegations contained in the affidavits now submitted by them as to the manner in which the court acted upon and granted their respective applications and in which the clerk perfected the record of the proceedings are true. There is, in addition to the differences already noticed, only the further difference between them, that the entry of the fact of the admission of A. J. Christern and of Heinrich Weinberger is contained in the book labeled "Naturalization Index," and that the entry of the fact of the admission of Arnold Geisemann is contained in the book marked "Naturalization Record." But the difference in the designations of these books is of no importance, because regard must be had to their contents rather than their outside appearance.

In whatever aspect the case may be considered it clearly and distinctly appears that the clerk, in the performance of

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the duties assigned to him in these proceedings, was guilty of no omission which rendered the record, as made up by him, invalid. When the presiding judge, on giving judgment in each case admitting the applicant to citizenship, attested the fact thereof by affixing his initials to the preliminary proofs, and delivered the papers so attested to the clerk with the direction, express or implied, to do all that remained to be done, the judicial function was completed, and only ministerial acts remained to be done; and the papers so handed over, together with the oath of allegiance thereupon administered, became the judgment record of the court on being filed as such by the clerk and by reason of such filing. The record thus made up constituted a sufficient memorial or remembrance within the requirements of the common law. Thus, in *Parsons agt. Willoughby de Broke* (13 W. R., 315), it was held by COCKBURN, C. J., and CROMPTON, BLACKBURN and MELLOR, JJ., that a document becomes a record of the court by being delivered to the proper officer of the court, and received and filed by him as such, although it is not numbered or docketed.

If, on the other hand, it be deemed of importance that an entry should be made in some book, the entries contained in the books marked "Naturalization Index" and "Naturalization Record" fully answer every requirement that can be made in that respect. These books are in the nature of special minute books. They contain the record of special proceedings entertained by the court not in the exercise of its ordinary or general jurisdiction as a court of the state of New York, but in the exercise of a jurisdiction specially delegated to it by act of congress; and the entries, as they appear therein, present in themselves a better and more detailed record, and at the same time one which is better adapted for purposes of ready reference, than the ordinary entry of the fact of admission would present or be, if inserted in the general minute book of the court. There is no law or rule which forbids this court to keep as many minute books as it may deem expedient.

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In any aspect of the case, therefore, the claim advanced by the chief supervisor of elections for the southern district of New York, to the effect that the judgments of this court admitting the promovents to citizenship respectively are a nullity for want of an entry in the general minute book, and that consequently the said parties are not citizens of the United States, is utterly untenable. It rests upon a mere technicality which no court can listen to with patience. His proceedings against the promovents are wholly unjustifiable, for the statutes of the United States, under which he proposes to act, confer no such authority upon him.

Section 5424 of the Revised Statutes provides for the punishment of every applicant or witness who in any proceeding under the naturalization acts personates any other person than himself, or appears in an assumed or fictitious name or disposes of or uses any false paper. Section 5425 makes it unlawful for any person (1) to use or attempt to use any certificate of citizenship knowing the same to have been unlawfully obtained; or (2) to knowingly possess a false or forged certificate of citizenship with intent unlawfully to use the same; or (3) to accept or receive any certificate of citizenship with knowledge that it was fraudulently procured.

Section 5426 makes it unlawful for any person (1) to in any manner use, as evidence of a right to vote, any certificate of citizenship knowing the same to have been unlawfully issued; or (2) to unlawfully use or attempt to use a certificate or order issued in the name of any other person.

Section 5427 applies to persons aiding or abetting.

Section 5428 makes it unlawful for any person (1) to knowingly use any certificate of naturalization procured through fraud or by false evidence, or issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or (2) to falsely represent himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever.

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Section 5429 provides that the provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced.

These provisions originally constituted the act of July 14, 1870, entitled, "An act to amend the naturalization laws and to punish crimes against the same, and for other purposes." Prior to 1870 false swearing by either applicant or witness in a state court could only be punished, as decided in *The People v. Sweetman* (3 Park. Cr. 358), by the courts of the United States; and whether an indictment would lie in any such case depended upon the statute of the United States relating to perjury.

Fraud, other than perjury, could not, prior to 1870, be punished criminally at all unless the particular offense could be brought within the thirteenth section of the act of March 3, 1813, entitled "An act for the regulation of seamen on board the public and private vessels of the United States." That section made it a felony to falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, any certificate or evidence of citizenship referred to in the act, or to pass, utter or use as true any false, forged or counterfeited certificate of citizenship, or to make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued and to whom it may of right belong.

These provisions having been found inadequate congress passed the act of July 14, 1870.

The provisions of this act apply only to offenses committed subsequent to the passage of the act. But in order to provide, as near as possible, a remedy against false and fraudulent certificates of citizenship previously obtained and yet avoid the objection which might be raised to an *ex post facto* law, the use of such certificates, and even their possession with intent to use them, was prohibited as therein provided. The cer-

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tificates, the use or possession of which is thus prohibited, may be divided into four classes, viz.: 1. Certificates which are forged or counterfeit and, hence, are not at all the act of the court whose seal they profess to bear. 2. Certificates which, though genuine in all respects and issued pursuant to the direction of the court, were procured by or for the applicants named therein by means of some imposition or fraud practiced upon the court. 3. Certificates issued by the clerk or other officer of the court without lawful authority in cases in which there was no appearance and hearing of the applicant in court; and 4. Certificates issued to a person other than the one who uses or attempts to use it. But the prohibition does not apply to a case in which there was an honest compliance on the part of the applicant with the requirements of the law, and the court, in the exercise of its jurisdiction, made or gave the proper order of judgment, but of which the clerk neglected to make an entry, though he filed it and although he issued the certificate. In such a case the certificate is valid and conclusive. Much less does it apply to a case like the cases at bar in which every thing was done which the law and the practice of the court required to be done.

If the chief supervisor of elections were possessed of evidence showing that the promovents procured their admission to citizenship by means of a fraud or imposition practiced upon the court, and would lay such evidence before this court, I should not hesitate for a moment to vacate the judgments. In all such cases this court will most cheerfully co-operate to punish the guilty parties. Moreover, if such proof exists in any case the guilty party should be indicted and tried in the federal courts, and the offense committed should not be condoned upon a surrender of the false or fraudulent certificate to the chief supervisor of elections which would leave the record of admission unimpeached, and under the decisions above referred to conclusive, and the offender at liberty to procure a duplicate certificate.

But to cast discredit upon the records of this court gener-

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ally without possessing any such proof, and that by resorting to the merest technicality in cases in which it is conceded that the applicants duly and honestly complied with all the requirements of the law, is a proceeding which deserves the severest condemnation. From 1858 to 1873 about 40,000 aliens, including over 1,000 women, were naturalized by this court in precisely the same manner as the promovents were naturalized. If the records of this court were a nullity as to the latter they would be a nullity as to every one of the 40,000 persons admitted during that period.

True, in 1873, in addition to all that was done during the preceding fifteen years, the practice of making brief entries in the regular minute book was resumed and it has been continued ever since. But this was done because the attention of the court had been drawn, by its present efficient clerk, to the very technicality now insisted upon and in order to obviate all possible objection on this ground in the future though possessed of no merit or force. At any rate this step, taken by way of abundant precaution, cannot detract, as I have already sufficiently demonstrated, from the validity of the prior records.

Certainty, in respect to citizenship, is of inestimable importance. What sovereignty has a right to command his person, his time, his property, and to establish the conditions of his domestic relations and the rule of succession for him and those dear to him is a vital question for every man. What civil and political rights he possesses, and to what sovereignty he must look for protection, depends upon his status as a citizen. If these 40,000 persons did not legally become citizens of the United States, and by virtue thereof citizens of their respective states, the title to real estate of the value of many millions of dollars may hereafter be drawn in question. On the other hand certainty of citizenship is of equal importance to the government. If these 40,000 persons did not legally become citizens none of them can be held subject to military or jury duty by the federal or any state government.

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Even, therefore, if a defect in the record existed in consequence of the omission of some ministerial act by the clerk, the United States government, in the absence of a law declaring such defect final, could not afford to insist upon it. The United States are so largely indebted to immigration for their power, greatness and prosperity that it would be an act of folly to return to the illiberal policy of George III, who, in consequence thereof, stands charged in the declaration of independence with having endeavored to prevent the population of the states by obstructing the laws for the naturalization of foreigners and by refusing to pass others to encourage their immigration hither.

I think I have now conclusively established that there is no defect whatever in the record of the admission of the promovents, and that even if absence of an entry in the general minute book could be deemed a defect it is one which is immaterial and whose disregard is demanded by every consideration of public policy. Indeed, it is one of the fundamental principles of the law that every court is the guardian of its own records and master of its own practice (*Broom's Leg. Max.*, 127).

There being no defect in the record which requires perfection by amendment the motions must be denied on the ground that no necessity exists for granting them. Heinrich Weinberger, however, may have a duplicate certificate of citizenship in case the chief supervisor of elections shall persist in detaining the original.

Barney agt. Northern Pacific Railroad Company.

SUPREME COURT

HIRAM BARNEY agt. THE NORTHERN PACIFIC RAILROAD COMPANY.

Complaint — Answer — Demurrer — remedy where process has been improperly served, i. e., on the wrong party or person.

A defendant on whom process has been improperly served is not bound to seek relief by motion. He is entitled to set up by answer that he is not indebted to the plaintiff, not being the person against whom the plaintiff's alleged claim exists.

Where the plaintiff sued the Northern Pacific Railroad Company for services rendered in 1873, 1874 and 1875, and alleges that defendant was and is a corporation created by an act of congress approved July 2, 1864, and various acts amendatory thereof, the defendant, who claims to be a new and different Northern Pacific Railroad Company, sets forth in his answer, and alleges as a defense, that all the property, rights, liberties and franchises belonging to said Northern Pacific Railroad Company (as originally organized) of every kind and description, "including its franchises to be a corporation," were sold, pursuant to a decree of the circuit court of the United States, and that said sale was afterwards confirmed by said court, and that the defendant, on whom process has been served, became purchasers at said sale and is the new organization known as the Northern Pacific Railroad Company and was not in existence when the transaction mentioned in the complaint arose, &c.; on demurrer to this defense on the ground that the same is insufficient in law on the face thereof:

Held, that these allegations are averred as matters of fact, and the demurrer necessarily admits these facts. It was not necessary, in order to render the defense available, that it should have been pleaded that process was not served on the old corporation.

Special Term, January, 1878.

DEMURRER by the plaintiffs to the first defense set forth in the answer to the complaint on the ground that the same is insufficient in law on the face thereof.

Barney agt. Northern Pacific Railroad Company.

Thomas H. Hubbard, for plaintiff.

George Gray, for defendant.

LAWRENCE, *J.* — The plaintiff, as assignee, brings this action to recover for services, alleged to have been performed by certain attorneys and counselors at law, for the defendant, during the years 1873, 1874 and 1875.

The first defense set forth in the answer is, in substance, that the Northern Pacific Railroad Company was duly incorporated under an act of congress, approved July 2, 1864, and that by a joint resolution of congress, the company was authorized to issue its bonds "for the construction of its road and to secure the same by mortgage and for other purposes" and was also authorized to issue its bonds, to aid in the construction and equipment of its road, and to secure the same by mortgages on its property and its right of property of all kinds, &c., *including its franchise as a corporation*. It is then averred that on or about the first of July, 1870, the said last named company under the authority of said joint resolution, made a mortgage to certain trustees, of the properties, rights, liberties, and *franchises*, of the said Northern Pacific Railroad Company, to secure the payment of its bonds, &c. It is also averred that the said last named Northern Pacific Railroad Company having become insolvent and having failed to pay the interest on its bonds, which became due on the 1st of July, 1874, and on the 1st of January, 1875, a suit for the foreclosure of said mortgage was commenced in the circuit court of the southern district of New York, and that a receiver was appointed in said cause of all the property, real, personal and mixed of said company, and said company executed a deed of conveyance of said property to said receiver on or about May 1st, 1875. That on the 12th day of May, the said circuit court, made its final decree in said cause, that the property, rights and franchises of the said Northern Pacific Railroad Company be sold under the

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direction of masters or commissioners, that upon the confirmation of said sale by the court, the masters convey the said property, rights and franchises in said decree mentioned to the purchaser or purchasers and that such sale and conveyance, should convey all the rights, title, estate and interest of said defendant therein named, in and to the said property, rights and franchises of the said Northern Pacific Railroad Company to said purchaser or purchasers, and should be a perpetual bar, both in law and equity, against said company, and against all claiming under the same, and that the receiver should also convey with the trustees all said property, rights and franchises, by good and sufficient deeds, &c.

The answer then avers that on the 12th of August, 1875, "the said *property, rights and franchises, being all the property, rights, liberties and franchises* of and belonging to said Northern Pacific Railroad Company of every kind and description, *including its franchise to be a corporation,*" were sold pursuant to said decree, to certain parties named in the answer, being a committee appointed by the bondholders in pursuance of a plan of reorganization, adopted at a meeting of said bondholders, for the use and benefit of all holders of said bonds who should assent to said plan, *that the said sale was afterwards confirmed by said court*, and the said masters by their deed and the receiver and trustees by their respective deeds, also approved by the court, conveyed all said property, rights and franchises to the said purchasers, for the use and benefit of all the holders of said bonds who should assent to, and comply with, the provisions of said plan.

It is further alleged that on the 29th day of September, 1875, the said bondholders organized as a corporation, by electing from their number a board of directors, who on the next day met and elected a president, vice-president, secretary and treasurer, under said acts and joint resolutions of congress, and thereby became and still are the corporation mentioned in the first paragraph of this answer, by the name of "The Northern Pacific Railroad Company, *the defendant on whom*

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process has been served in this action." It is further averred that the present defendant was not in existence when the transactions mentioned in the complaint arose, &c.

By demurring to this answer the plaintiff admits the allegation, that all the property, rights, liberties and franchises of, and belonging to, said Northern Pacific Railroad Company, of every kind and description "*including its franchises to be a corporation,*" were sold pursuant to said decree. This is averred as matter of fact, and the demurrer necessarily admits the fact. The plaintiff also admits that the said alleged sale was afterwards confirmed by the circuit court of the United States for the southern district of New York, a court, having jurisdiction of the subject-matter.

So, too, the plaintiff by demurring has admitted the fact that the defendant on whom process has been served, is the new organization known as the Northern Pacific Railroad Company.

In the face of these admissions, much of the argument made by the learned counsel for the plaintiffs, relative to the distinction existing between the franchises of a corporation, and the franchise to be a corporation appears to me to be inapplicable.

Again, by admitting that the process was served on the present company, I fail to understand how the plaintiff can contend that the defendant is a mere interloper, or that, in order to render the defense available, it should have been pleaded that process was not served on the old corporation. There is but one defendant named in the title of the action, and the corporation answering alleges that the process by which this action was instituted has been served upon it. The court cannot infer that process has been served upon another and separate organization of the same name. Indeed, if any inference is to be drawn it is that process has not been served on any other party, there being but one defendant, and it being admitted by the demurrer that process has been served upon the corporation which answers the complaint.

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Nor do I understand that the defendant, on whom process has been improperly served, is bound to seek relief by motion. He is entitled to set up by answer that he is not indebted to the plaintiff, not being the person against whom the plaintiff's alleged claim exists. Suppose the case of two individuals bearing the same name, against one of whom a creditor intends to bring an action, but by an error the summons is served on the other, cannot the latter put in an answer denying that he is indebted to the plaintiff? The cases which are cited by the learned counsel for the plaintiff, while holding that it is competent for a person who is erroneously served with process to move to set it aside, do not hold that he cannot appear and answer denying any liability on his part to the plaintiff.

If I am right on this last point, without reference to the other points herein alone considered, it follows that the demurrer cannot be sustained.

Demurrer overruled, with costs to the defendants.

Turner agt. Treadway.

COURT OF APPEALS.

MARTHA M. TURNER, administratrix, &c., Respondent, *agt.*
LEMUEL B. TREADWAY, appellant.

Promissory note — Bona fide holder.

Where the plaintiff receives a note from the payee in payment of a precedent debt, but surrenders no security or evidence of indebtedness and parts with no value, he is not a *bona fide* holder for value, and the note in his hands is subject to all defenses, legal and equitable, which existed against it in the hands of the original payee.

Argued October 6, 1873 ; decided October 10, 1873.

Samuel Hand, for appellant.

P. E. Havens, for respondent.

ALLEN, *J.* — The plaintiff received the note in suit from the payee in payment of a precedent debt, but surrendered no security or evidence of indebtedness, and parted with no value. The indebtedness of the payee and indorser to the plaintiff was a simple contract indebtedness for a wagon sold and delivered for an agreed price and was not evidenced by any writing or written acknowledgment, and there was, therefore, nothing to surrender or cancel. The case is squarely and precisely within the uniform decisions in this state, from *Coddington agt. Bay* (20 *J. R.*, 437), to *Weaver agt. Barden* (49 *N. Y.*, 287). The plaintiff was not a *bona fide* holder of the note for value, and it was, therefore, subject, in his hands, to all the defenses, legal and equitable, which existed against it in the hands of the original payee.

The judgment must be reversed and a new trial granted.

All concur.

NOTE. — The above case is partially reported in memoranda, in 53 *New York*, at page 650, and has been considered of sufficient importance to publish in full. [ED.]

Phenix Insurance Company agt. Church.

N. Y. COMMON PLEAS.

THE PHENIX INSURANCE COMPANY, plaintiff and appellant,
agt. SIMEON E. CHURCH, defendant and respondent.

Promissory note — Bona fide holder.

The spirit and purpose of all the decisions lead to the establishment of the general principle that a *bona fide* holder of negotiable paper fraudulently obtained or diverted, is one who receives it before maturity without notice and parts with value for it.

Receiving a diverted note upon surrendering a past due check of the party from whom it is received is not a parting with value within the rule, because the check is merely evidence of a debt which still remained collectible. The reason stated.

General Term, June, 1878.

APPEAL from an order of the New York marine court general term reversing a judgment of the trial term of that court in favor of the plaintiff.

Rathbun & Tillotson, for plaintiff and appellant.

S. E. Church, defendant and respondent in person.

LARREMORE, J. — The defendant gave the note in suit to Worcester without consideration and for a specific purpose; he diverted it and indorsed it in blank to one H. A. Brown, in payment of a previous indebtedness. The firm of which Brown was a member were indebted to one Faunce as agent of the plaintiff in the sum of \$606.75 on December 31, 1874. The firm made a payment on account and gave its check for the balance (\$527.39) on January 2, 1875. The check was dishonored on its presentation at the bank although frequently

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demanding up to March following, when Faunce pressing Brown for a settlement he offered to exchange the defendant's note for the check. Faunce communicated with the plaintiff and subsequently accepted the note and gave up the check. Judgment was rendered for plaintiff in this suit to recover the amount of the note which was reversed at the general term and appeal taken to this court.

There is no doubt that plaintiff took the note without notice of existing equities between the parties to it.

The only question for adjudication is, whether there was a sufficient consideration for the transfer. We are confronted with numerous authorities upon this point from *Roy* agt. *Coddington* (20 J. R., 54) to *Moore* agt. *Rider* (65 N. Y., 438) and extending over a period of time from 1822 to 1875.

The spirit and purpose of all these decisions, divested of judicial dicta, lead to the establishment of the general principle that a *bona fide* holder of negotiable paper fraudulently obtained or diverted is one who receives it before maturity without notice and parts with value for it (*Park Bank* agt. *Watson*, 42 N. Y., 490, and cases cited and reviewed).

It is conceded that the holder of unrestricted negotiable paper, received before maturity in payment for an existing debt due or to grow due, may recover against the maker (*Brown* agt. *Leavitt*, 31 N. Y., 113; *Day* agt. *Saunders*, 1 Abb. Ct. App. Dec., 495).

The case at bar is distinguished in this, that plaintiff, at the time it received the note, neither gave nor surrendered anything of value, the original indebtedness of the firm to the plaintiff of \$606.75 existed prior to the giving of the check of \$527. 39, which latter was but evidence of a part of the debt. That debt, to the extent of the amount of the dishonored check, has not been paid and, for aught that appears, the firm of H. A. Brown, Pope & Co., is still liable therefor.

The mere credit of the note by plaintiff on account of the firm debt was not final or irrevocable; no special agreement is

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shown that plaintiff surrendered or assigned any right or claim it then had against the firm.

The note was but additional security for the debt given in exchange for a worthless check. *Moore agt. Ryder* (65 N. Y. 438), to my mind, is decisive of this case. The court per judge EARL, holds as follows: "The law enables a *bona fide* holder of negotiable paper which has been fraudulently obtained, diverted or used to recover thereon only to protect him against loss, upon the principle that when one of two innocent parties must suffer by the fraud or wrong of a third person the one who put it in the power of such third person to commit the fraud or wrong must bear the loss. In case the holder of such paper has not parted with any value or incurred any binding obligation or changed his position to his detriment on the faith thereof he cannot recover thereon against the party defrauded or wronged."

It appearing as a fact found at the trial that the note had been diverted or misapplied, the holder should be held to strict proof that a recovery thereon was necessary to protect plaintiff against loss or that its position had been changed to its detriment on the faith of the note.

In this I think the evidence is insufficient; the authorities relied upon by the appellant's counsel clearly recognize the distinction between unrestricted and diverted negotiable paper taken in payment of an antecedent debt, for value paid, or as mere security. I think the evidence fails to establish the defendant's liability, and that the order of the general term reversing the judgment should be affirmed with costs.

I concur: C. P. DALY, C. J.

Cregin agt. Brooklyn Cross Town Railroad Company.

CITY COURT OF BROOKLYN.

JAMES CREGIN agt. BROOKLYN CROSS TOWN RAILROAD
COMPANY.

Revisor — Survivorship — Action by husband against railroad company to recover for loss of services and medical attendance of wife who was injured through negligence.

A cause of action in favor of a husband against a railroad company for the loss of services of his wife who was injured while in the act of getting off the cars, while a passenger, through the negligence of the company, survives and may be revived and continued in the name of the administrator.

The cause of action is for a wrong done to "the property, rights or interests" of the husband and survives to his personal representatives.

General Term, May, 1878.

THIS was an action brought by the husband (the plaintiff above named) to recover for loss of services of his wife in consequence of injuries received, she being at the time a passenger upon the defendant's cars for hire.

Such damage is alleged to consist of expenses incurred and to be incurred for medical attendance, &c., together with the following allegation of damage :

"Seventh. That the plaintiff has, ever since said injuries were received, been deprived of the comforts and services of his said wife, and will, he verily believes, permanently be deprived of the same by reason of the premises, all to the damage of the plaintiff the sum of ten thousand dollars."

The action was commenced on or about the 11th day of September, 1877. Issue was joined by the service of the

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defendant's answer on the 1st day of October, 1877. After this action was commenced, to wit, on the 11th day of February, 1878, the plaintiff, James Cregin, died intestate, and on the 1st day of March, 1878, letters of administration upon the estate of said James Cregin, deceased, were duly made and issued by the surrogate of the county of Kings to Thomas Cregin, who qualified and entered upon his duties as such administrator. On motion that this action be continued in the name of Thomas Cregin, administrator, &c., the following opinion was rendered :

Special Term, April, 1878.

REYNOLDS, J. — This is a motion to revive a suit brought by a husband for damages sustained by him in consequence of injuries to his wife, the husband having died pending the action.

The Revised Statutes (*Banks' 5th ed., vol 3, p 746, sec. 1*) provides that "for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executors or administrators, against such wrong-doer," &c. Section 2 provides that "the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator."

When a married woman is injured by a wrong-doer two distinct causes of action arise from the same wrongful act: one for the injury to the person, which cause of action belongs to the wife, and the other for loss of services and expenses of medical attendance, &c., which belongs to the husband. This last is embraced within the plain terms of section 1 above quoted. It is for a wrong done to "the property, rights or interests" of the husband and survives to his personal repre-

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sentatives. It is not a mere incident of the wife's cause of action but is an independent claim arising, it is true, from the same injury, but resting on grounds of its own. "The person injured," in the meaning of section 1, is the person whose "property, rights or interests" are affected. Nor does the claim come under the restriction contained in section 2. It is not an action for "injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator." This language plainly means *personal* injuries (as distinguished from injuries to property rights) inflicted upon the one who himself, or whose executor or administrator, brings the action. It would apply to the claim of the wife but not to that of the husband.

This view is not in conflict with the decision in *Wade* agt. *Kalbfleisch* (58 N. Y., 282). That action was held not to survive on the ground that it did not relate to property interests but to personal injuries.

I am referred to the case of *George* agt. *Van Horn* (9 Barb., 523) where it is said that the executors or administrators of a deceased father or master cannot maintain an action for the seduction of his daughter or servant in his lifetime. That was not the case before the court, and so far as such an action may be supposed to be for actual loss of service or expense I must take the liberty of differing from the dictum above referred to. But as such actions, while technically founded on loss of service, &c., are allowed to be the means of redress for injured feelings and disgrace, they do, in that aspect, die with the person injured. This is evidently what the judge meant. He says "they (the executors or administrators) cannot represent his aggravated feelings and the personal disgrace heaped upon him by such events. These causes of action are purely personal and like assaults, libel and slander die with the person."

This reasoning does not apply to the case in hand. I think this cause of action survives. The motion is therefore granted, with ten dollars costs to abide event.

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On appeal to the general term from the order continuing the action in the name of the administrator :

J. Warren Lawton, for plaintiff and respondent, made and argued the following points :

It is provided as follows by 3 Revised Statutes (*Bank's 6th ed.*, p. 732 [448], *tit. 3, art. 1*) :

Section 1. For wrongs done to the property, rights or interest of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators against such wrong-doer, and after his death, against his executors or administrators in the same manner and with like effect, in all respects, as actions founded upon contract.

Section 2. But the preceding section shall not extend to actions for slander, for libel or to actions for assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator.

And by Code of Civil Procedure.

Section 757. (Amended 1877.) In case of the death of a sole plaintiff or defendant, if the cause of action survives or continues, the court must, upon a supplemental summons and complaint, or in its discretion, upon a motion, if made within one year after the decedent's death, in a proper case, allow or compel the action to be continued by or against his representative or successor in interest.

I. The actions founded on tort, which do not survive, are limited to the exceptions in section 2 of Revised Statute (quoted above): *Haight agt. Hayt* (19 *N. Y.*, 467, 474); *Fried agt. New York Central Railroad Co.* (25 *How. Pr.*, 286, 288).

II. The cause of action here for loss of wife's services is a vested right.

III. This action arose out of assumpsit. Though in form for a wrong, it is founded on contract. It is founded on an

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"engagement," and is technically a "claim" (*Campbell agt. Perkins*, 8 *N. Y.*, 438, 441; *Cox agt. N. Y. C. and H. R. R. R. Co.*, 63 *N. Y.*, 421).

IV. The order of special term was correct, and should be affirmed with costs.

Britton & Ely, for defendants and appellants.

NEILSON, *J.* — We think that the order should be affirmed on the ground stated in the opinion at special term.

The action was not brought to recover damages for a personal injury, but to obtain compensation for a pecuniary loss. Had it been tried in the lifetime of the plaintiff the verdict he might have obtained would not have been enhanced by the fact that his wife had suffered pain, or his own feelings been wounded by her condition, however sad or helpless. The verdict would have been as far removed from mere sentiment or sympathy, as most verdicts in respect to property are.

The question whether the claim survives or not, is governed by the statute (3 *Rev. St.*, 782, *secs. 1 and 2*).

This claim does not belong to either of the classes of actions mentioned in the second section. It does come within the first section, as the recovery sought is for the expenses of medical attendance, and for loss of service. The character of the action is not affected by the usual formula of the pleader as to the loss of the comfort and society of the wife; no additional element is thus brought in for which damages could be allowed.

The actions which survive are for *wrongs done to the property, rights or interests* of the party; a comprehensive description. The intent was to reach cases where the subject of the action was something more or other than mere property, commonly so called. If not, why were the words, *rights or interests* used. The plaintiff had a *right* to the services of his wife; the wrong affected his interests, as he was bound to pay for medical attendance.

I see no reason why a less liberal construction should be

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given to the statute. It would, indeed, be hard and inequitable, if a claim which the intestate had against the wrong-doer for such nursing and medical attendance, died with his person, although paid or yet payable out of his estate. In such an instance the statute favors the remedy, which works out, at most, a mere indemnity.

McCUE, J., concurred.

Hemmenway agt. Mulock.

SUPREME COURT.

WILLIAM F. HEMMENWAY agt. WILLIAM G. MULLOCK and others.

Mortgage — Agent for the purpose of procuring a loan — Effect of agent's filling in name of mortgagee after execution of mortgage — Estoppel.

Where B., an attorney, had been requested by the mortgagor to procure him a loan on the property and the papers were executed and acknowledged by M., the mortgagor, and after execution and acknowledgment were sent by K., and by him delivered to B. for the purpose of obtaining a loan thereon, and B. applied to H., the plaintiff, who consented and gave B. a check for \$5,000, the amount asked for, and received the bond and mortgage from B. and delivered the latter to B. to record, the mortgagor and mortgagee never having seen each other:

Held, that B. was M.'s agent for the purpose of raising money on the bond and mortgage, and the delivery of the same by B. to H. was a good delivery and binding upon M., the defendant, and that the payment of the \$5,000 by H., the plaintiff, to B. was a payment to M., the defendant, through his agent.

Although the name of the mortgagee was not filled in at the time of the execution of the mortgage, under the peculiar circumstances of the case, the papers must be *held* to have been delivered to B. by the mortgagor with authority to fill in the name of the mortgagee.

A bond and mortgage executed in *blank* as to a *material* part, with *parol* authority to fill up the blank and deliver it, is good.

B., the agent of defendant, drew the money on plaintiff's check for \$5,000 but did not pay it to defendant, claiming some unsettled account between them, and after some months sent \$3,500 back to plaintiff. Plaintiff commenced foreclosure which was settled by the mortgagor signing a paper dated December 9, 1876, acknowledging the payment to B. of the \$1,500 on account of the mortgage, and on this plaintiff paid the mortgagor the \$3,500 balance:

Held, that if one of two innocent persons must suffer pecuniary loss from the dishonesty of B., that the defendant is the person who must sustain the loss.

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Held, further, that the defendant, by the execution of the instrument dated December 9, 1876, is estopped from denying the validity of the bond and mortgage on the ground that the mortgagee's name was not inserted at the time the instrument was executed.

Special Term, January, 1878.

THIS action was brought to foreclose a mortgage for \$5,000 given by defendant Mulock to the plaintiff on premises in the city of New York. It appeared that one Berry, an attorney, had been requested by the mortgagor (defendant Mulock) to procure him a loan on the property, and Berry applied to plaintiff to make same; plaintiff consented and told Berry he should expect him to see that the title was right. Berry reported the title as good and plaintiff gave him a check for \$5,000, and received the bond and mortgage and delivered the latter to Berry to record. The mortgagor and mortgagee never saw each other. Berry drew the money on the check but did not pay the money to Mulock, claiming some unsettled account between them and after several months sent \$3,500 back to plaintiff. Interest being unpaid, plaintiff commenced foreclosure which was settled by the mortgagor signing a paper acknowledging the payment to Berry of the \$1,500 on account of the mortgage and on this plaintiff paid the mortgagor the \$3,500 balance and proceedings were discontinued. The present suit was instituted on a subsequent default of interest. Defendant claimed, and gave evidence to the effect, that the bond and mortgage was sent to him for execution by Berry and when executed and returned by him to Berry the mortgagee's name was not inserted. It appeared that the name was inserted by Berry's clerk who drew the papers and the instrument was complete when plaintiff first saw them, and when he gave his check to Berry. Defendant claimed that Berry was plaintiff's agent and there was no authority in him to insert the mortgagee's name; that Berry having retained the \$1,500 and not paid it to defendant, the latter was not chargeable with that sum as a payment on

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account of the loan, and that as to the \$3,500 subsequently paid, the agreement recognizing the \$1,500 payment had been exacted from defendant as a condition of his receiving the \$3,500 and made the latter payment usurious.

J. H. V. Arnold, for plaintiff.

Dudley Field, for defendant.

LAWRENCE, *J.* — That Berry was the agent of Mulock, for the purpose of procuring a loan on the faith of the bond and mortgage produced upon the trial, cannot, I think, be doubted.

The papers were executed and acknowledged by Mulock, and sent over to New York by Kalisch and by him delivered to Berry for the purpose of obtaining a loan thereon. This is quite evident, I think, not only from the testimony of the defendant Mulock, and of the witness Kalisch, but also from the language of the defendants' letters. Writing to Berry under date of October 5, 1875, Mulock urges Berry to try and get the "money for me as soon as possible," and in the letter of October 9, 1875, he says, "you said you would have the money this week; to-day is Saturday and I have not had one line from you." These letters were both written after the execution and acknowledgment of the bond and mortgage before the commissioner of deeds.

The testimony in regard to the name of the mortgagee not having been filled in at the time of the execution of the mortgage is not very positive, and it would be exceedingly difficult to say, from an inspection of the instrument itself, that there is any indication that the name was inserted subsequently. Even if such insertion was made by Berry after the papers had been handed to him by Kalisch, I am of the opinion that under the peculiar circumstances of this case, the papers must be held to have been delivered to Berry with authority to fill in the name of the mortgagee.

The bond and mortgage, as I have determined on the evi-

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dence, were delivered to Berry, as Mulock's agent, for the purpose of raising money thereon. This would appear to bring the case within the principle maintained in *Knapp* agt. *Maltby* (13 *Wend.*, 590), *Tervia* agt. *Evans* (1 *Anst.*, 228) and in the cases cited in 3 *Washburne on Real Property* (4th ed., p. 242). The cases cited by the learned counsel for the defendant were, as I understand them, cases in which material alterations were made in instruments after execution, without the authority of the party to be affected by the alterations, and where, from the circumstances of the case, there could have arisen no implication that it was intended to confer an authority to make such alteration or additions.

I am, therefore, of the opinion that the delivery of the bond and mortgage by Berry to Hemmenway was a good delivery, and binding upon the defendant, and that the payment of the \$5,000 by the plaintiff to Berry was a payment to the defendant through his agent.

It follows, then, that if one of two innocent persons must suffer pecuniary loss from the dishonesty of Berry, that the defendant is the person who must sustain the loss.

I am further of the opinion that the defendant, by the execution of the instrument dated December 9th, 1876, which I cannot but conclude was executed with a full knowledge of all the facts, is estopped from denying the validity of the bond and mortgage on the ground that the mortgagee's name was not inserted at the time the instrument was executed. So far as the defense rests upon the question of usury, I deem it sufficient to say that I do not think that it has been established.

The plaintiff is entitled to a decree of foreclosure and sale. The findings may be settled on two days' notice.

Bowery National Bank agt. Duryea.

COURT OF APPEALS.

BOWERY NATIONAL BANK, respondent, agt. ABRAM DURYEA,
appellant.

Order of arrest — what must affirmatively appear to justify the vacating of, under section 558 of the Code of Civil Procedure — Extrinsic facts upon which the order is granted not to be inserted in the complaint.

Under the Code of Civil Procedure an order of arrest may be obtained in two classes of cases: *First*, in those where the cause of action is identical with the cause of arrest, and *second*, in those where facts extrinsic to the cause of action constitute the cause of arrest. In the latter class of cases it is improper to allege in the complaint those extrinsic facts.

To justify the vacating of an order of arrest under the last clause of section 558 of the Code of Civil Procedure, it must *affirmatively* appear by the complaint that the cause of action is such that in no event could the defendant be arrested within the provisions of either section 549 or 550 (*Affirming S. C.*, 55 *Hov.*, 88).

September, 1878.

THIS was an appeal from an order of the general term of the supreme court of the first department, reversing an order made at special term vacating the order of arrest granted in the action, on the ground that it was the intention of the legislature, by the last clause of section 558 of the Code of Civil Procedure, to compel a party to insert in his complaint the extrinsic facts upon which the order of arrest was granted, that the defendant might take issue thereon and have the same tried by a jury.

Abraham Kling, for respondents.

William M. Ivins, for appellant.

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HAND, J. — The appellant insists that the new Code has effected a great change in the law of arrest in civil actions, and that under the five hundred and fifty-eighth section an order of arrest must be vacated unless the cause of arrest appears in every case in the complaint itself. The grounds for this claim were very fully and ingeniously presented to us by the counsel for the defendant, but after full consideration I am unable to adopt such a construction of the statute. I think the court below were right and that its order must be affirmed.

It is urged that the intention of the legislature was to do away with the alleged anomaly previously existing of compelling defendants to litigate a question involving their personal liberty, without a jury, before the court upon affidavits, while entitled to a jury trial upon the much less important questions of liability under contracts to pay money and the like. That it was intended by the section under consideration to require plaintiff to insert in the complaint not only his cause of action but a statement of the facts upon which he relies to entitle him to arrest the defendant, although extrinsic to the cause of action, and thus to give the defendant the opportunity to take issue upon them alone, and have the verdict of a jury thereon. In an action for money loaned, as in the present case, where such loan and the non-payment thereof is the sole cause of action, but the plaintiff has procured an order of arrest upon affidavits showing fraudulent representation of the defendant as to his circumstances at the time of contracting the loan, the contention of the appellant necessarily goes the length that the complaint must set out these fraudulent representations, and the defendant, admitting the cause of action, may take issue upon the falsity of the representations alone, and have a jury trial thereon.

It is impossible to believe that so sweeping a revolution in the method of pleading in, and conducting the trial of, actions upon contract would be introduced without much plainer, more specific and unmistakable language in the statute. In fact,

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there is no provision for such trials or for the proper judgments to be entered upon the verdicts therein, or for such interpolations in the pleadings.

The latter clause of the section (*Code, sec. 558*) provides that "at any time after the filing and service of the complaint the order of arrest must be vacated, on motion, if the complaint shows that the case is not one of those mentioned in sections 549, 550 of this act."

Section 549 enumerates cases where the right to arrest depends upon the nature of the action, and section 550 those where the cause of arrest may be extrinsic and *dehors* the cause of action.

It was held by the special term that the complaint in the present case shows affirmatively that the case was not one of those mentioned in sections 549, 550, in as much as it alleged a simple breach of contract to pay a loan, for which neither section authorized an arrest. The counsel for the appellant, however, as I understand him, rather insists that the order of arrest must be vacated when the complaint (*as in this case*) *fails* to show affirmatively that the case *is* one of those mentioned in these sections, and construes the language of section 558 as if its last clause read, "if the complaint does *not* show that the case *is* one of those mentioned in sections 549, 550."

It seems to us that the only proper interpretation of the words is, that the order is to be vacated when the complaint shows affirmatively that the case is not one of those mentioned in the two specified sections. And where the action is one of those mentioned in section 550, and the complaint contains only a statement of the cause of action and not the extrinsic facts set forth in the affidavits for the order of arrest, it does not thereby show affirmatively that the case is not one of those mentioned in sections 549 or 550.

On the contrary, it shows that it may be one of those mentioned in the latter section.

It cannot be justly said that this interpretation necessarily confines the operation of section 558 to actions under section

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549, and makes its references to section 550 wholly without effect, for, in many actions under the latter for money received, for instance, the statement of the cause of action itself might show that the money was not received in a fiduciary capacity.

An insuperable objection to the view of this section urged by the appellant is, that many of the causes of arrest mentioned in section 550 may come into existence after the complaint is served and the cause at issue, and the plaintiff be entitled to an order of arrest thereon, although his complaint was framed before they arose.

To this the answer suggested is, that by a change of the Code as to supplemental pleadings it is made imperative upon the court to permit a supplemental complaint to be filed in a proper case, and thus this contingency is provided for (*Code, sec. 544*); but this court has held that the change in the phraseology of this section has not changed the law as to allowing supplemental complaints; and if this were otherwise, we cannot accede to the proposition that the statute plainly and expressly authorizing an order of arrest upon affidavit for matters occurring after issue joined, by implication merely, the power to grant such order depends upon the plaintiff's procuring, upon notice, leave to serve, and serving, a supplemental complaint, setting up such new matter. There is no clause in the statute permitting the insertion of such extraneous matter in a pleading, whether original or supplemental. The new Code, as well as the old, confines the complaint to a "plain and concise statement of the facts constituting the cause of action" (*Code, sec. 481*), and there is no propriety in inserting in the supplemental complaint any new allegations other than those material to the cause of action.

The order of the general term must be affirmed, with costs.

All concur, except CHURCH, Ch. J., not voting, MILLER and EARL, JJ., absent.

Champlin agt. Seeber.

SUPREME COURT.

DELANO A. CHAMPLIN, as receiver of property, &c., agt. ELIZA
SEEBER and CORA SEEBER, by guardian.

Judgment against debtor — Deed by mother to daughter when void — Gift — donatio mortis causa — When party may testify in his own behalf as to conversation with deceased — Code of Procedure, § 899.

Action by a receiver, in behalf of a judgment creditor, to set aside, as fraudulent, a conveyance from a mother to her daughter, and to collect out of the real estate so conveyed, a judgment recovered against the mother, which real estate the mother inherited from her father. The judgment was for a debt contracted by the mother for goods purchased by her. The father died intestate January 25, 1875. The conveyance was made after the debt upon which judgment was recovered was contracted. The consideration for the conveyance was one dollar. The mother and daughter were both allowed to testify at the trial in their own behalf. The mother testified: "I had a conversation with my father January ten or twelve, and before he was taken sick, on the subject of his property, in which he said he wished me to give to my daughter Cora my share of the property. What part he gave to me *he wanted me* to give it to Cora, if it was given to me, what part was to come to me; said nothing about a will at that time, nothing else was said; I said I was willing to convey it to her, and did do it." Cora, the daughter, testified that she was present when the conversation took place between her grandfather and her mother and corroborated her mother as to the conversation. Some of the goods were bought before the death of the grandfather. The defense is that the conveyance was made in pursuance of the direction of the grandfather; that the mother was an equitable trustee of her father and considered herself equitably bound to execute such trust according to the request and direction of the father:

Held, that, the mother and daughter were competent witnesses in their own behalf. They were not called to speak of transactions and communications had with a *deceased* person against his administrator,

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executor, heir at law, next of kin, assignee, devisee or survivor of such deceased person (*Code, sec. 899*).

Held, also, that, as the conveyance was executed after the debt accrued upon which the judgment was recovered, and when the mother conveyed this property to her daughter, she had no other left and was insolvent, the conveyance was a mere voluntary one without a good, adequate, and valuable consideration therefor, and was void as against the plaintiff and the judgment creditor.

Nor could the conveyance be upheld as a *donatio mortis causa*. Such gifts must be consummated by a delivery and must clearly appear to have been made in contemplation of death and to be unrevoked.

Herkimer Special Term, June, 1877.

ACTION to collect a judgment recovered against Eliza Seeber out of real estate which she inherited from her father, Samuel W. Shepherd, deceased. He left four children and Eliza inherited an undivided one-fourth from her father who died intestate, January 25, 1875. The judgment was for a debt contracted by Eliza for goods purchased by her of M. J. Gartland, a merchant doing business in Little Falls, and the debt was assigned by him to Ezra Smith, 15th of December, 1875, who obtained judgment on it. Eliza was examined upon an order in supplementary proceedings, August 16, 1876, and there testified: "I owned this one-fourth interest in the real property my father left, up to the time I made the deed to Cora; I have no property now; don't claim to own any; I did not have any other property at time I transferred this property to Cora except what I transferred; all the consideration for the deed was (\$1) one dollar." The property is described in the complaint as that which was owned by S. W. Shepherd, deceased, and which descended by law to his four children one of whom was Eliza Seeber. The deed from Eliza to Cora was drawn by W. S. Parker, at Herkimer, and Eliza paid him two dollars and fifty cents for his services, and she testifies she did not know the value of the land conveyed. Before the referee, Cora testified she is the daughter of Eliza Seeber and grantee named in the deed; that she was with her

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mother at the time the deed was made and "I got the dollar that I gave her as consideration, of my uncle Irving; I got the dollar the day before; I told him I wanted to borrow some money of him; he asked me how much, I told him one dollar; I did not give him a note for the dollar; I have not made any deed of the property; I knew that my mother was purchasing the goods of Gartland at the time she got them; I knew that she had them charged, that she got them on credit; they were not paid for at the time that the deed was made that I know of; Smith did not see her until after the deed was made; my mother did not owe me any thing at the time this deed was made; I knew that this property *that mother sold to me* was all the property she owned." The deed from C. P. Bel-linger to S. W. Shepherd was 26th November, 1832 and recites a consideration of \$3,050. Monson and wife dated 15th April, 1859 to S. W. Shepherd, consideration \$500. Deed of Eliza Seeber to Cora Seeber, dated 27th March, 1876, consideration one dollar and was recorded March 28, 1876, in book 106, page 499. Upon the trial of this action Eliza Seeber was called as a witness in her own behalf and testified, that she had a conversation with her father, January tenth or twelfth and before he was taken sick; that the conversation was on the subject of his property. "Q. What did he say he wanted done with your share of that estate? A. Give it to Cora, my daughter. Q. State what he said in respect to your share of the real estate? A. What part he gave to me *he wanted me* to give it to Cora if it was given to me, what part was to come to me; said nothing about a will at that time; nothing else said that I remember. Q. What did you say to that? A. Nothing; I was willing that she should have it all. Q. Did you say that to him? A. Yes, sir. Q. Said you was willing to convey it to her? A. Yes, sir. Q. And you were, and did do it? A. Yes, sir; father was sick fourteen or fifteen days. Q. He told you you might give it to Cora, did he? A. He told me I should." "Some of the goods were bought before father's death for which this judg-

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ment was obtained." Cora Seeber was called and testified that she was fifteen years old June 15, 1877, and that she was present when the conversation took place between her grandfather and her mother. "He said he would like to have mamma give her part to me. Q. What did your mother say in reply to it? A. She said she would; I went with mother to the lawyer's office in Herkimer when the deed was drawn; gave her one dollar which I borrowed of my uncle."

Judgment was recovered by Smith against Eliza Seeber, May 6, 1876, for fifty-nine dollars, and a transcript filed in Herkimer county clerk's office, June 10, 1876, and the judgment duly docketed. It was upon a debt arising prior to December 15, 1875. The defense is, that the conveyance was made in pursuance of the direction of the grandfather. That Eliza was an equitable trustee of her said father and considered herself equitably bound to execute such trust according to the request and direction of her said father. Plaintiff was appointed receiver duly in proceedings upon said judgment.

E. E. Sheldon, for plaintiff.

George W. Smith, for defendants.

HARDIN, J. — Eliza and Cora Seeber were competent witnesses in their own behalf. They were not called to speak of transactions and communications had with a deceased person against his administrator, executor, heir at law, next of kin, assignee, devisee or survivor of such deceased person (*Code*, sec. 399; *Green* agt. *Edick*, 56 *N. Y.*, 613; *Lobdell* agt. *Lobdell*, 33 *How.*, 347; *Simmons* agt. *Sisson*, 26 *N. Y.*, 264; *Card* agt. *Card*, 39 *N. Y.*, 317). The objections of the plaintiff to such evidence are, therefore, overruled.

The death of S. W. Shepherd, intestate, vested in Eliza Seeber, his daughter, the fee to the one undivided fourth part of the real estate owned by him in his lifetime and described in the complaint. She held the legal title and was entitled to

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the possession of the undivided fourth part of said real estate from January 25, 1875, until she conveyed it away, March 27, 1876, at Herkimer, by her deed there executed to her daughter, Cora Seeber, in consideration of one dollar only. That was after the debt upon which Smith recovered judgment against Eliza accrued. When she conveyed away that property she had no other left and was insolvent and the one dollar was an inadequate consideration. The conveyance apparently was a mere voluntary one without a good and adequate and valuable consideration therefor. The deed purports to be given for a money consideration and no allusion is made in it to any other consideration (2 *John. Ch.*, 47).

These facts would require the court to hold the deed void as against the plaintiff and the judgment creditor represented by him in as much as the debt was contracted prior to the conveyance and the judgment therein settled and establishes the liability of Eliza Seeber for the debt. If the defendants were to seek to uphold the conveyance to Cora as a *donation causa mortis* from the grandfather to the granddaughter they would be met by the principle that such gifts must be consummated by a delivery and must clearly appear to have been made in contemplation of death and to be unrevoked (*Champney* agt. *Blanchard*, 39 *N. Y.*, 111; 7 *Lans.*, 108; *Gray* agt. *Barton*, 55 *N. Y.*, 71).

But the defendants seek to sustain the conveyance as in pursuance of a conversation had between the grandfather and his daughter 10th or 12th of January 1875, when, it is said he requested his daughter Eliza to give her share of his estate to her daughter Cora. Confessedly, after the death of Shepherd, Cora could not have compelled the execution of a conveyance to her by her mother Eliza. The parol agreement would have been void as are all parol agreements as to real estate. It could not be enforced as a legal trust, for the statute of uses and trusts condemns it. Having been executed it is now insisted that it is valid between the parties. This may be affirmed; but how is it as to creditors of Eliza having

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debts contracted before the conveyance and apparently upon the credit of the inheritance (2 *Johns. Ch.*, 47).

The case of *Lowery agt. Smith* (16 *N. Y. Sup. Ct.*, 514) is cited by the learned counsel to sustain the defense. In that case it was held the evidence of the agreement made by the husband with his father-in-law in respect to taking title to the real estate to realize \$600 therefrom and then to convey to his wife the daughter of the grantor should be received. So far the case is strictly an authority in point. The evidence in this case of the conversation between Eliza and her father was received in deference to that authority. But if we examine that case further we find that the deed, in legal effect, was a mortgage to secure \$600 and that as soon as the \$600 was realized out of it, the husband had no beneficial interest in the estate as he had agreed to convey the equity of redemption or what might remain after the \$600 debt was enforced to his wife, the daughter of the grantor.

In this case the conversation of Shepherd amounts to a request that "What part he gave to me he wanted me (Eliza) to give to Cora" "if it was given to me." "What part was to come to me," *i. e.* that the daughter should, after the inheritance of it, subsequently give it to her daughter Cora. Eliza assented to the request. The effect of the conversation was (1) that Eliza should inherit, should become the owner of the fee (2), that she would herself *give* it away to Cora.

Surely, that is much different from a direct gift by Shepherd to the granddaughter Cora. So far as rested upon the grandfather to give legal direction of his estate he vested the fee and beneficial ownership of one-fourth of his estate in his daughter Eliza. This result followed from his ownership, death intestate and without conveying away his property from his heirs-at-law. Of course it would have been competent for him to give by deed to his granddaughter or by will to devise it to her, but he did neither, he died intestate allowing the property to descend to and vest in the daughter Eliza, leaving only a naked request to his daughter "that she give

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her share to her daughter Cora," Instead of being generous to the granddaughter he chose to be just to his daughter and asked her to be generous with her inheritance and give it to her daughter Cora.

Even with such a request she ought to be "just before she was generous." She kept the inheritance, contracted debt in the time she held the title to it, allowing her creditor to trust her in reliance upon her ability by reason of the property to pay and thus created an equitable lien in favor of the creditor; that debt ought to be paid before she gave her property to another. As we have before seen it was Eliza's property. The conversation with the grandfather contemplated that it should become hers by operation of the law of descents; the evidence of the conversation bears out this view. "What part he *gave* to me he *wanted* me to *give* to Cora if it was given to me; what part was to come to me; nothing else that I remember."

The purpose of the grandfather seemed to be that his daughter, after she got the property, should give it to Cora instead of any other person. But he deliberated, died and allowed it to descend and vest in law absolutely in his daughter Eliza.

This view of the evidence in this case distinguishes the case from *Lowery agt. Smith (supra)*.

The defense is unavailing against the creditor. There must be a judgment declaring the deed by Eliza to Cora void and fraudulent as against the creditor's judgment and the judgment a lien upon the property described in the complaint.

Judgment ordered accordingly.

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SUPREME COURT.

STEPHEN V. WHITE agt. DANIEL DREW

Stock — Contract to carry — Valuable information sufficient consideration to uphold — Statute of frauds.

Reliable information as to facts upon which the future price of a stock will depend, is a sufficient consideration to uphold an agreement or contract in relation to such stock. Such information being concededly of great value is just as effective to take the case out of the statute of frauds as if a cash payment had then been made.

One who offers a reward for information is bound by his contract to the person who responds to his offer. The same rule applies with equal force where the information is proffered by one and accepted by another under a contract by him to carry certain stocks for the benefit and profit of the party imparting the information.

Where plaintiff, being in possession of valuable information in relation to a certain stock which he proposed to impart to defendant upon condition that if defendant should consider it sufficiently important to warrant his acting upon it he (defendant) should hold 5,000 shares of such stock at cost for plaintiff's account, and at his risk and subject to his orders, for a period of sixty or ninety days, to which defendant assented and thereupon plaintiff imparted said information which defendant accepted and acted upon, pronouncing it the best "point" he had heard of in a long time:

Held, that the moment the information was given and the transaction assented to by defendant it was an executed contract and the defendant bore the same relation to the plaintiff, in regard to this stock, as stock brokers ordinarily bear to the customers for whom they are carrying stocks.

The plaintiff became the owner and the defendant the pledgee of the stock, charged also with the further duty to continue to carry without margin until directed to sell as provided by the agreement.

The title to the stock (5,000 shares) was in the plaintiff and he was entitled to an immediate delivery at any time of the specific stock agreed to be

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set apart and held by defendant for him, on tendering to the defendant the price agreed upon for the same, with accrued interest.

Kings Special Term, June, 1878.

THIS was a motion upon the minutes to set aside a verdict in favor of the defendant rendered by the jury by direction of the court and for a new trial.

The action was upon a promissory note made in March, 1875.

The sole defense was a counter-claim for an amount largely exceeding the amount of the note arising out of a joint transaction between the parties in the stock of the Rock Island Railroad Company some years before the making of the note.

The reply admitted the counter-claim, but alleged payment and satisfaction thereof through certain transactions between the parties in the common stock of the Chicago and Northwestern Railway Company in the winter and spring of 1873.

The reply alleged, and plaintiff's testimony tended to show, that it was agreed when the transaction in Rock Island stock was closed (the whole loss upon which was paid by Drew so that White became his debtor for one-half thereof) that the parties should endeavor to retrieve their loss by some future joint speculation in that or some other stock.

In February, 1872, White became possessed of valuable information in respect to an approaching contest for the control of the Chicago and Northwestern Railway Company, and also became satisfied that Drew had purchased, and was holding, a large amount of the common stock of that company, a portion of which he was attempting to sell.

Being in possession of such information White called upon Drew, stated his belief as to the latter's position, and offered to communicate the information to him upon condition that if Drew should consider it sufficiently important to warrant his acting upon it he would countermand his orders to sell the stock and hold 5,000 shares, at cost, for White's account, and at his risk and subject to his orders, for a period

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of sixty or ninety days for the purpose of making up his share of the loss on the Rock Island transaction.

Drew admitted that he held a large amount of the stock, assented to White's proposal and asked him to impart the information.

White, thereupon, told Drew what he had learned about two pools just being formed to buy large quantities of that particular stock, and that Drew pronounced the "point" the best he had heard of in a long time and immediately, with White's assistance, countermanded his outstanding orders to sell and kept his stock.

It was further agreed between the parties that if the stock should decline in price White should furnish a margin for the 5,000 shares to be carried for his account, and that if a profit should be realized on those shares it should go toward the payment of his indebtedness to Drew.

The price of the stock advanced upwards of eleven per cent within sixty days, and that a settlement was then had between the parties by which White's interest in the 5,000 shares was transferred to Drew in satisfaction of White's liability on account of the former speculation.

The defendant moved the court to direct a verdict in his favor for the excess of his counter-claim over plaintiff's claim, upon the grounds that the agreement set up in the reply was void under the statute against betting and gaming, and also under the statute of frauds.

The court submitted the case to the jury, but after they had failed to agree directed a verdict for the defendant as requested and reserved the points raised by the defendant's motion for consideration upon a motion to be made by plaintiff, upon the minutes, for a new trial.

B. F. Blair, for plaintiff.

Alvin Bush and *Freeman J. Fithian*, for defendant.

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PRATT, J. — As the cause of action alleged in the complaint and the counter-claim are respectively admitted by the answer and reply, and the only real subject of controversy is the alleged agreement and transaction thereunder set out in the last named pleading, it was deemed advisable, upon the failure of the jury to agree, in view of the important and novel legal questions involved, the fact that the jurors failed to agree upon a verdict and the heavy expense attending such a trial, to direct a verdict for the defendant for the excess of the counter-claim over the amount claimed by the plaintiff, in order that if, after full argument, I should conclude that the agreement set out in the reply is void, a new trial would be avoided, and if I should come to a contrary conclusion, the same result would follow as if the verdict had not been directed. It is clear, that if the evidence by the plaintiff in support of his reply, assuming it to be true, would not authorize a finding, that, as matter of law, would constitute a payment of defendant's counter-claim, in whole or in part, it was folly to submit the case to a jury, and the defendant is entitled to judgment upon the verdict so directed.

On the other hand, if from the evidence so given by the plaintiff, the jury might have drawn conclusions that would constitute a valid agreement, going to extinguish defendant's counter-claim, he is entitled to have the benefit of a jury trial upon the questions of fact involved.

There are two aspects, then, brought to view in this motion to set aside the verdict and for a new trial.

First, what conclusions of fact, would it be competent for a jury to draw from the evidence given by the plaintiff, and second, do such conclusions, as matters of law, constitute a valid defense to the defendant's counter-claim?

In order to consider the first question fairly it will be necessary to quote, somewhat largely from the testimony, aside from stating the undisputed facts of the case.

Prior to February, 1872, the plaintiff had become indebted to defendant in the sum of about \$50,000, arising out of stock

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transactions, which he claims defendant had agreed should be liquidated or worked out by future speculations. On the tenth of that month the plaintiff, having become possessed of certain information in regard to the probable rise in the market price of the shares of the capital stock of the Northwestern Railroad Company, had an interview with the defendant in which the following conversation took place:

The plaintiff states: "I told him that certain facts had come to my knowledge." "That feeling confident that if his position was what I thought it was we could both make a great deal of money out of it, and *before I would tell him what it was* I said to him that I should want him to promise me that when I named his position, named this stock and named what I thought he was (doing) upon it, to tell me first whether I was correct in my surmise as to his position and the next thing was whether, if when I told him the facts that had come within my knowledge, if he *and I both concurred in the view that it was going to advance the price of the stock*, that then he would allow me to take an interest of 5,000 shares in the stock that he held, if he held it, *to both of which preliminary to going into the facts, Mr. Drew assented* — I then told him," &c. Upon receiving the information defendant agreed to hold and carry for the plaintiff 5,000 shares at the price of seventy-four dollars per share of \$100 each, at the same time pronouncing the information of great value and importance.

There can be no doubt of the sufficiency of the consideration. Reliable information as to facts upon which the future price of a stock will depend is perhaps the most valuable consideration that could be paid to an operator. In the possession of the plaintiff it would enable him to operate with success. When he imparted it to defendant the latter could do the same.

The knowledge of a fact cannot be called "mere words." The information communicated by a professional man has always been held a sufficient consideration to sustain assumption.

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It has never been doubted that the one who offers a reward for information, is bound by his contract to the person who responds to his offer.

This information was concededly of great value and was just as effective to take the case out of the statute of frauds as if a cash payment had then been made.

The moment the information was given and the transaction assented to by defendant it was an executed contract and the defendant bore the same relation to the plaintiff, in regard to this stock, as stock brokers ordinarily bear to the customers for whom they are carrying stocks.

The plaintiff became the owner and the defendant the pledgee of the stock, charged also with the further duty to continue to carry, without margin, until directed to sell as provided by the agreement.

The title to the stock (5,000 shares) was in the plaintiff and he was entitled to an immediate delivery at any time of the specific stock agreed to be set apart and held by defendant for him on tendering to the defendant the price agreed upon for the same with accrued interest.

These views, if correct, render it unnecessary to discuss the objection that this transaction was a wager.

The stock advanced rapidly in price. When it had reached the price of about eighty-five dollars per share the plaintiff and defendant had an interview in which the plaintiff instructed the defendant to close the transaction in one of three ways, to which he readily assented.

The plaintiff had a right to assume, and he testifies that he did assume, that the transaction was closed and the profits applied in extinguishment of defendant's claim against him.

The fact that defendant subsequently said he had forgotten to sell the stock does not imply that he thereby proposed to continue to hold it for plaintiff, or that he then had it even. Neither does it follow that he had not adopted one of the other courses authorized, viz., taken the stock upon his own

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account at the market price and credited plaintiff with the profits.

On the contrary, the fact that he did not tender the stock to the plaintiff nor sell it shows satisfactorily that he did elect to adopt the latter alternative.

The defendant had agreed to close the transaction in one of the ways directed by the plaintiff, and the plaintiff relied upon that agreement.

It seems to me clear that defendant is estopped from alleging that he did not carry out his agreement.

Furthermore, from the subsequent conversations and dealings between the parties a jury must be satisfied that defendant intended to charge himself with the stock. He acknowledged the extinguishment of the indebtedness by the profits of the transaction, to which plaintiff was entitled, at a time when the latter could have secured a result much more favorable to himself if defendant had not practically agreed that the stock was disposed of in one of the methods directed.

Again, it does not appear that defendant ever afterwards claimed that plaintiff was the owner of the stock, or that he was continuing to carry it for him. It does, however, fairly appear that defendant, in consequence of having large amounts of the stock, did not desire the plaintiff's stock should be thrown suddenly upon the market, and therefore he might well have taken it himself to avoid that result.

Whether an actual entry was made in the books of account or elsewhere showing this disposition is immaterial.

It was doubtless defendant's intention to do so, and the intention was consummated by his having possession of, and exercising control over, the stock.

As he already had possession a formal delivery of the stock certificates to retransfer to him the title was unnecessary.

It follows, from these views, that the verdict must be set aside and new trial granted.

Matter of One Hundred and Twenty-seventh Street.

SUPREME COURT.

In the Matter of ONE HUNDRED AND TWENTY-SEVENTH STREET.

Street openings — Eminent domain — Constitutionality of statute of 1813.

The provision contained in chapter 86, Laws of 1813, regulating the opening of streets, avenues and public places in the city of New York that commissioners of estimate and assessment shall not allow compensation for any building erected, in part or in whole, upon any street, avenue, public square or place laid out upon the map or plan of the city, after the filing of the map, does not conflict with section 6 of article 1 of the Constitution, which provides that private property shall not be taken for public use without just compensation

Special Term, September, 1878.

MOTION to confirm report of commissioners of estimate and assessment.

The commissioners of streets and roads appointed by chapter 115, Laws of 1807, on the 1st day of April, 1811, filed a map laying out the city of New York north of Houston street.

On said map a street, designated as One Hundred and Twenty-seventh street, was laid out, and upon the map relaying out a portion of said city, filed March, 1868, by the Central Park commissioners the said street was retained. This proceeding was then instituted by the department of public works on behalf of the city to acquire title to the land in said street for public use, and commissioners of estimate and assessment were appointed by the supreme court. On the 2d day of August, 1878, the commissioners presented their report to the

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court for confirmation. By their report an award was made to the estate of John McArthur for so much of his land as was required or taken, but nothing was allowed for the buildings upon said land. The commissioners stated as their reason for so doing that the said building was erected after the filing of the city map in 1811.

James A. Deering, opposed.

I. The provision of the street opening act of 1813, by which the commissioners have been guided, is in conflict with article 1, section 6 of the Constitution of this state. "Nor shall private property be taken for public use without just compensation." Until the report of the commissioners is confirmed the city acquires no right or title in and to the land within the street lines, nor are owners entitled to compensation until that event (*Matter of Parade Ground*, 60 N. Y., 319; *Matter of Anthony Street*, 20 Wend., 618). The survey and mapping are not a taking, and until the report is confirmed the city has no power to enter, to use, grade or otherwise interfere with the possession or use of the owner. The value of land consists principally in the power and right to use it, and that right cannot be restricted or qualified (*Seaman agt. Hicks*, 8 Paige R., 656; *Corporation agt. Mapes*, 6 Johns. Ch. R., 46; *Varick agt. Smith*, 5 Paige Ch., 146, 159; *Matter of Central Park Extension*, 16 Abb. Pr., 65). The statute, by attempting to deprive the owner of the right to use for an indefinite period of time, is clearly unconstitutional (*Moale agt. Baltimore*, 5 Md., 314; *Matter of Central Park*, 16 Abb. Pr., 65). The statute of 1813 is only in force in so far as it does not conflict with the present Constitution (*Detmold agt. Drake*, 46 N. Y., 318).

II. The provision of the act of 1813 is unconstitutional for the additional reason that it is in conflict with section 7 of article 1. "When private property shall be taken for any public use the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by

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a jury or by not less than three commissioners appointed by a court of record as shall be prescribed by law." This section vests in the commissioners the sole power of determining what is just compensation and what circumstances are to be considered by them in making such estimate. The commissioners are to value the property at the time it is taken, and the provision in question, by attempting to remove from their consideration the value of a portion of such property and directing them as to what they shall estimate, is a legislative attempt to determine what compensation shall be allowed.

The power to *ascertain* is vested in the commissioners exclusively and consists in the right to consider every element of value of the whole property taken, and that right cannot be confined or limited by the legislature. Action by the legislature would be an attempt to violate the Constitution by usurping powers it withholds. The prohibition of the act of 1813 is opposed to the discretion and judgment vested by the Constitution in the commissioners (*Rochester Waterworks agt. Wood*, 60 *Barb.*, 137; *Menges agt. Albany*, 56 *New York*, 374; *House agt. Rochester*, 15 *Barb.*, 517; *Clark agt. Utica*, 18 *id.*, 45; *Beekman agt. R. R. Co.*, 3 *Paige*, 45).

Josiah Porter, for *Mary McArthur*, opposed.

William C. Whitney, counsel to corporation, for motion, cited *In the Matter of Furman Street* (17 *Wend.*, 649); *Matter of Wall Street* (17 *Barb.*, 617 *et seq.*).

DANIELS, J. — The objection taken to the motion to confirm the report of the commissioners of estimate and assessment is, that they failed to allow as damages the value of certain buildings required to be removed in opening and working the street. The commissioners declined to award damages for these buildings for the reason that the street had been laid out on the map filed of that part of the city in which it is situated previous to the year 1813, and by the terms of the act passed in that year, no compensation was to be allowed in

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opening such streets for the value of buildings erected upon the grounds designated as streets on the map of the city which had been so filed (*Laws of 1813, chapter 86, sec. 178*).

The provisions of this act were expressed in it in the following terms: "Provided also that it shall not be lawful for the said commissioners of estimate and assessment to be appointed under and by virtue of this act to allow any sum or compensation whatsoever for any building or buildings which, at any time subsequently to the filing of the maps mentioned in the fifth section of the said last mentioned act (*chap. 115, Laws of 1807*), may have been built, placed or erected in part or in whole, on any such street, avenue, public square or place, laid out by the said commissioners of streets and roads in the city of New York, under and by virtue of the last mentioned act.

No question was made but that the map of these had been properly made out and filed, and the streets designated thereon, as that had been provided for by the preceding act mentioned in this section of the act of 1813. But the facts were conceded to be that the map had been legally made out and filed, and that this was one of the streets laid out and designated upon it. But the objection taken to the confirmation of these proceedings has been placed upon the ground that this provision of the act of 1813 was practically abrogated by the adoption of the Constitution of 1846.

The buildings were placed upon the land designated as such streets after the adoption of this Constitution, and not many years before these proceedings were instituted. The precise period of time when they were put up is not important. It is only material for the consideration of the objection presented, that the streets had been laid out upon the map made and filed before the enactment of the law of 1813, and that the buildings for which compensation has been claimed were placed upon the street after the adoption of the Constitution of 1846, and while its provisions were in full force and effect.

In support of the objection made, it has been urged that

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this portion of the act of 1813 is in conflict with that part of section 6 of article 1 of the Constitution, which declared that private property shall not be taken for public use without just compensation. From that it has been urged that the owners of the land designated to be devoted to the purposes of the street, had the right to use it the same in all respects as though no street had been mentioned to be laid over it. But neither this, nor any other provision of the Constitution, in terms, or by any clear implication, assumed the existence of any such right.

The land devoted to the street did remain in the owner until it was actually appropriated by legal proceedings to the use of the public as a street and proper compensation was provided for it. But before that it had been affected by a valid law at the time when it was enacted, depriving the owner of compensation for buildings afterwards placed upon it. At that time the legislative authority was unrestricted and undoubted in this respect, and the act was within the acknowledged and proper scope of legislative authority; and it was enacted to meet what was then believed to be the wants and to provide for the protection of the public interests in what it was then believed would soon become a large and important commercial city. Its object was to make suitable provisions for its future enlargement and expansion; and the policy of it, while it was not prejudicial to the property owners, was not unreasonably generous to the public. It declared and defined the prospective rights and interests of both; for it defined the property which the owners could securely improve, and that which the public should afterwards use. The future rights of both were at once established, and its policy became interwoven with the future growth of the city. It took effect at once, and to that extent, and when there was no obstacle in the way of its enactment, it affected the property subject to its provisions. To that extent it became an executed law when no constitutional impediment whatever could be supposed to stand in its way.

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Afterwards the Constitution of 1821 was adopted, with the same provision in it restraining the taking of private property for public use without compensation, as was repeated in the Constitution of 1846. It was expressed in the same terms in both these instruments, and still they were not considered when in the first to be in conflict with this prohibition of the act of 1813. That is evident from the further provision declaring that such acts of the legislature of this state, as are now in force, shall be and continue the laws of this state, subject to such alterations as the legislature shall make concerning the same (*Const. 1821, art. 7, sections 7, 13*). It is entirely evident from this that the framers of that Constitution did not consider that there was any conflict between this provision, providing for the inviolability of private property, and that made by the act of 1813, concerning the future opening of the streets laid out over this portion of the city, and if it was not in conflict with that Constitution, it seems to follow that it should not be held to be so with the same provision, when it has been simply reasserted in the Constitution of 1846. That this provision of the act of 1813 did not conflict with the declaration made in the Constitution of 1821 is further apparent from the decision which was made *In the Matter of Furman Street* (17 *Wend.*, 649), which, with the other cases of *Jackson agt. Mayor of Brooklyn*, and *Hicks agt. Mayor of Brooklyn*, are stated to have been affirmed by the court of errors of this state (*Matter of Wall Street*, 17 *Barb.*, 617, 632, 640), and which would not have taken place if the acts of the nature of 1813 had been superseded by any thing contained in the Constitution so soon succeeding them. These cases have been questioned, but never overruled. And they certainly cannot be disregarded as authority, as long as the Constitution so clearly declared that the existing acts of the legislature should all remain in force until the new legislature deemed it proper to change them. No such change was at any time made in this provision of the act of 1813, and accordingly it continued in force, and so

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remained, although the Constitution was in full force, declaring that private property should not be taken for public use without compensation. The prohibition of compensation for buildings placed within the bounds defined for the streets by the map filed previous to 1813, was regarded as not in conflict with what the Constitution had provided upon this subject; no change in this respect was made in the Constitution of 1846; but it was further declared that "such acts of the legislature of the state as are not in force shall be and continue the law of the state, subject to such alterations as the legislature shall make concerning the same; but all such parts of the common law, and such of the said acts, or parts thereof as are repugnant to this Constitution are hereby abrogated" (*Article 1, sections 6, 17*). This last sentence was the only addition upon this subject which was made in the last Constitution beyond that which was contained in the preceding Constitution, and it requires no different rule of construction, for as the prohibition that private property should not be taken for public use without compensation was not repugnant to the act of 1813, when it existed in the first Constitution, it certainly did not become any more so afterwards by reason of its repetition in the Constitution of 1846.

A preceding act does not become repugnant to another afterwards enacted, when they may both be maintained and enforced together. This is a very well-settled principle of construction (*Bowen agt. Leare, 5 Hill, 221-225; Wallace agt. Bassett, 41 Barb., 92-96*); and though most commonly applied to the interpretation of statutes, it is, nevertheless, equally applicable to the consideration of the effect of constitutional provisions.

Both the statute of 1813 and the Constitution of 1846 may be at the same time enforced, concerning the same subject matter; for private property is not taken for public use without compensation, by means of a statutory enactment that, after it has been laid out as a highway, it shall not be built upon by the owner at the expense of the public, and if built

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upon in violation of the prohibition, that he shall not be paid for the buildings, the removal of which his own act has rendered necessary.

Authorities have been cited in support of objection taken to the confirmation of the report of the commissioners, but in none of them can any thing be found warranting the application of a different or broader construction of this provision of the Constitution than that already suggested. The act cannot be held to be repugnant to the Constitution, after it was so long maintained in harmony with the same provision, while it was contained in the Constitution preceding the present one. In each the same solicitude was manifested for the protection of private rights. And, as this law was held to be valid under one, and was so in substance declared by its own language, it should not be held repugnant to the same restraint when included in the other. The motion made to confirm the report must accordingly be granted, and the objection overruled, but without costs.

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N. Y. COMMON PLEAS.

SUSAN E. ABBETT agt. GEORGE FREDERICK.

Pawnbrokers — their liability.

A pawnbroker is liable only for ordinary diligence, and where his place of business is broken into and articles pledged are taken therefrom he is not liable, if he exercised ordinary diligence.

General Term, May, 1876.

APPEAL from a judgment of one of the district courts, in favor of the defendant.

George C. Furman, for plaintiff and appellant.*H. E. Farnsworth*, for defendant and respondent.

VAN BRUNT, *J.* — The defendant in this action is a licensed pawnbroker, having his place of business at No. 128 Bleecker street, New York city.

The plaintiff, prior to the 7th day of October, 1875, obtained loans from the defendant, and as security for the repayment of the same, pledged a gold brooch, two (2) silver watches, one pair of ear-rings and one pair of sleeve links. This property was kept by the defendant in a drawer locked underneath his counter. On the night of the seventh of October, the defendant's shop was broken into by burglars, and these pledges, together with a great quantity of other property was stolen, and this action was brought to recover the value of plaintiff's pledges.

The rule laid down in the case of *Arent agt. Squires* (1 *Daly*, 347), that, "in cases of pawn or pledge all that has

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ever been required since the days of Bracton, by the common law on the part of the pawnee has been that which is required of warehousemen, the exercise of ordinary diligence" is the law which must govern this case.

It is established by the evidence beyond dispute that the property was taken by burglars who broke into the defendant's place of business, and the only question which remained to be determined was one of fact, viz., did the defendant exercise ordinary diligence in his care of the property of the plaintiff?

This question of fact the justice found in favor of the defendant.

There is evidence in the case which justifies such a finding, and this court, upon appeal, must be governed by such finding.

Judgment must be affirmed.

ROBINSON, P. J.: I concur.

Sheldon Hat Blocking Co. agt. Eickmeyer Hat Blocking Co.

SUPREME COURT.

THE SHELDON HAT BLOCKING Co., plaintiff, agt. THE EICKMEYER HAT BLOCKING Co., ARCHIBALD T. FINN and CHARLES ATWOOD, defendants.

Corporation — Power of trustees — transfer of property to pay debts — delay in seeking equitable relief.

Directors and trustees of a corporation are its agents to advance the purposes and objects of its organization, and they have no authority, in virtue of their office, to perform acts, which to all intents and purposes, terminate the corporation by taking away from it the power to accomplish the object of its formation. But, while this is true, yet it is the duty of the trustees of a corporation to pay its debts and to apply the corporate property to this end, although it should exhaust them, and thus disable the corporation from carrying on its business.

The plaintiff, a corporation formed for the purpose of blocking and shaping hats, and making and licensing machines for stretching hats, for which it had letters patent, was prosecuted in the federal courts by the defendant corporation, for an infringement of its letters patent for stretching hats; the action resulted in a decree by which it was adjudged that the plaintiff's process was an infringement of the defendant's process, and it was perpetually enjoined from using the same, and it was adjudged to pay the sum of \$97,000 as damages for the infringement, which plaintiff was unable to pay.

Whereupon the trustees of the plaintiff entered into negotiations with the trustees of the defendant corporation for a settlement of the damages, which resulted in an agreement that the plaintiff should transfer to the defendant corporation its patents for blocking, as well as those for stretching hats, which latter had been adjudged to be an infringement, in payment and discharge of the judgment for damages, and which agreement was consummated by such transfer.

Held, in an action brought five years thereafter in the name of the plaintiff corporation to set aside such transfer as fraudulent and as *ultra vires*, that the transfer was valid and should be upheld, it not appearing that the plaintiff had at the time any other means of paying the judgment;

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and no offer being made, even now, to pay the same, and no readiness or ability to do so being alleged in the complaint:

Further, that as to the patent for stretching hats, the offending patent, which could no longer be used by the plaintiff, it was just, under the circumstances, that it should be surrendered and that the process for blocking hats, which could only be profitably used in connection with the stretching process, had no such value as to approximate to the amount of the judgment for damages; and that in making the transfer the trustees of the plaintiff, who directed it, did nothing more than apply its only available means to the payment of an acknowledged indebtedness, and that the value of the property transferred was not in excess of the amount of the claim of defendant.

Also, *held*, that the transfer was not void under the provisions of the Revised Statutes (*part 1, chap. 18, tit. 4, sec. 4*) forbidding the assignment by a corporation of its property in contemplation of insolvency. The effect of delay in seeking equitable relief in cases of this character considered.

Special Term, July, 1878.

George Ticknor Curtis, for plaintiff.

Luther R. Marsh, for defendant Eickmeyer company.

Edward T. Bartlett, for defendant Finn.

VAN VORST, *J.* — The complaint in this action charges, that certain assignments, made on the behalf of the plaintiff, and executed by Finn, the president of the plaintiff to the defendant corporation, of divers letters patent and licenses, on the 5th day of May 1873, were fraudulently made, in pursuance of secret and fraudulent negotiations, between himself and officers of the defendant corporation, and without the knowledge or consent of his co-trustees, and in furtherance of efforts on the part of the defendant corporation to obtain and acquire the patents and property of the plaintiff; that the acts of making and receiving the assignments, were illegal and void, and it is asked, that they be set aside, and the property restored to the plaintiff.

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The evidence establishes that the plaintiff was organized as a corporation, under the statutes of New York, for the purpose, among other things, of blocking and shaping fur and wool hats, and that part of its business was making and licensing machines for stretching and blocking hats.

The articles of incorporation were filed September 20, 1868.

The capital stock of the corporation was \$300,000, divided into 3,000 shares of \$100 each. No cash capital appears to have been paid in, but the stock was issued in payment for letters patent, which were transferred to it.

One of the patents owned by the plaintiff was for stretching the brims and tips of hat bodies, the others were for blocking hats.

The defendant corporation was also engaged in the business of granting licenses for both stretching and blocking hats under its own patents.

In the year 1870 the defendant corporation, commenced an action in the federal court, against the plaintiff, charging it with infringing its patents, for stretching the brims and tips of hats.

This action resulted in a decree made on or about the 31st day of January 1873, by which it was adjudged that the plaintiff's process was an infringement of the defendants' patent for stretching hats, and a perpetual injunction was issued thereupon against the plaintiff and certain persons, its licensees, who were joined as defendants with it.

By the decree, it was referred to a master to ascertain and report the damages sustained by the plaintiff in that action, occasioned by the infringement of its patents, and on or about the 16th day of April, 1873, the master reported damages against the plaintiff, in the action, to the amount of \$97,000, and upwards.

About the time of the commencement of the action in the federal court the plaintiff herein was advised by one or more patent experts, that their process was an infringement of the

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defendants' patent, and during the pendency of the action, and particularly after the decree ordering the injunction, and while the proceedings were pending before the master, the officers of the plaintiff became apprehensive of the result of the reference, and overtures were made on its behalf to the defendant corporation for some arrangement by which they could use the defendants' process for stretching hats.

Stockholders of plaintiff, engaged in the business of hat making, shared this apprehension, and were anxious that some arrangement might be made with the defendant corporation.

But no settlement or arrangement could be effected, which involved the right on the plaintiff's part, in any way, to use the defendants' process.

About the time the plaintiff's officers were advised of the master's report, the active trustees thereof consulted Charles M. Keller, Esq., their counsel in the action, who, in substance, advised them that the only course open to them, in so far as a legal contest was concerned, was to give security, which would be in double the amount of the sum reported by the master, and appeal from the judgment.

It is quite clear that the plaintiff was unable to furnish this security, even had its officers been disposed to adopt the course suggested by Mr. Keller. The plaintiff had no property, except its patent, and some machinery for blocking and stretching hats, which were in the hands of its licensees, and no moneys except some few thousand dollars due from the licensees.

The magnitude of the sum reported by the master seemed an insurmountable difficulty, and the result of the litigation in the federal court, rendered the prosecution of the plaintiff's business entirely hopeless, unless some arrangement could be yet made with the defendant corporation, by which the right to use its patent might in some way be secured.

Atwood, one of the trustees of the plaintiff, with Finn its president, called upon Mr. Sheather, the representative of the defendant corporation, who had the matter in charge, to learn

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what arrangement or settlement might yet be made. Sheather refused all compromise. The defendant corporation felt aggrieved at the plaintiff's infringement of its rights. Sheather insisted upon the payment of the whole amount; if not paid, he in substance said, that he would sell all the plaintiff's property, and invoke extreme measures. His manner was earnest.

Atwood then gave the matter up; to use his own language "gave up the ship." Sheldon, another trustee, had advised with the defendants' officers before this, but could secure no arrangement.

After the interview with Sheather, Atwood told Finn, the president of the plaintiff, that he must settle the matter the best way he could.

Failing to secure any other terms, the president offered, finally, to convey to the defendant corporation all the plaintiff's letters patent for blocking and stretching hats, and the outstanding licenses, in satisfaction of the defendants' claim for damages, which proposition was accepted.

The substance of this agreement, before it was carried formally into effect, was, by the president, communicated to Sheldon. The settlement was distasteful to him, but as he himself has testified, there were no stockholders of means to resist, and one or more of the stockholders informed Sheldon that they would be compelled to submit to such terms. Pearce, a stockholder and licensee, and a defendant in the action, also, finally so stated. Transfers were accordingly made to the defendant corporation of the plaintiff's patents and outstanding licenses, and a release was drawn and executed of the defendants' claim, to the damages awarded.

By the terms of the settlement, the defendant corporation was to collect the sums due from licensees, and pay over to the plaintiff, such as had accrued up to the 1st day of April, 1873, which they subsequently did. The sum paid to the president of the plaintiff, upon these licenses, amounted to about \$8,000.

The president paid to Sheldon, at this time, about that

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amount, and he shortly thereafter left this country for Europe, where he remained for three years, and then returned, and it is upon a complaint, verified by Sheldon, that this action to set aside the transfers is brought.

The stockholders of the plaintiff at or about the time of the transfers, learned of the fact of their having been made, but have, up to the time of the commencement of this action in the year 1878, taken no steps to impeach them.

Contemporaneous with the transfers of its patents, the corporation ceased to do business, and has not resumed it since.

The first question to be decided, upon this résumé of the evidence is, do the facts sustain the allegations of the complaint, by which it is claimed that the transfers were made in pursuance of a secret arrangement, wholly unauthorized, between Finn, the president, and the officers of the defendant, without the knowledge or approval of his cotrustees, in furtherance of improper aims on the part of the defendant corporation, by the acquisition of its property, to destroy the plaintiff?

I do not think that the facts justify a conclusion of such fraudulent purpose on the part of Finn and the others.

It is claimed, in the complaint, by way of establishing a fraudulent conspiracy and design, that Finn, the president, procured the advice to be given by Mr. Keller, to the effect that the only remedy open to the plaintiff, in the action in the federal courts, was through an appeal, upon giving bonds. It is claimed that such advice and counsel was erroneous and was part of Finn's scheme to discourage his associates and bring about the transfers.

The evidence wholly fails to show that the advice was given at the instance of Finn.

It was first given to the three trustees together, Finn, Sheldon and Atwood. My judgment is, that all Mr. Keller meant to convey to the trustees was, that the question of infringement was the principal subject. That that was the real question which they must meet, and that to correct any

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error in that regard, an appeal would be necessary in the end, and that would involve the giving of security.

With respect to the question of damages, he had been consulted previously, and had written to the plaintiff a letter, which is in evidence, and which announced the principles which must prevail in their consideration by the master, and he suggested the only way in which they might be mitigated.

It is true that any error of the master, in the computation of damages, might, upon exception, be corrected.

But there is nothing before me which shows any error, and the amounts reported must be taken as both proper and legal.

But whether Mr. Keller was right or wrong in the counsel he gave there is nothing to show that it was given or received in furtherance of any fraudulent purpose. The excellent standing of Mr. Keller in his profession, and as a man, forbids any such conclusion, in the entire absence of evidence, to give any support to it.

Nor is it true that the terms of the transfer were secretly arranged between Finn and the officers of the defendant corporation.

Three of the trustees, and some of the stockholders, knew of the demand of the defendant corporation, as a condition of the settlement, and gave in their adhesion, and Sheldon left the country with full knowledge of the fact of the transfers.

The transfers were not made, in my judgment, with any purpose of defrauding the stockholders of the plaintiff. I conclude, from the facts, that the trustees of the plaintiff, who participated in the settlement, had become satisfied that all hope of any adjustment, which was greatly desired, by which the plaintiff could secure a right in any way, to use the defendants' processes for stretching hats, must be given up and abandoned.

The damages were so large as to be beyond their means of payment, and the business of blocking hats, without the stretching process, was of little value.

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The trustees, and some of the stockholders at least, had a notion, whether correct or not, that the stockholders and trustees were personally liable for the damages, in the event that the corporation was unable to pay them.

Such were the principal reasons operating upon the persons representing the plaintiff, which led to the surrender of the patents, and licenses, by way of adjusting the difficulty.

In so far as the advice of Mr. Keller was concerned, it had no further influence than as it indicated his opinion, that the damages were computed upon principles which forbade any hope of material reduction, and that resistance for the future must be on the merits, by an appeal from the judgment itself.

It would seem that they had no reasonable ground of hope in that direction.

They had long before been advised by Mr. Renwick, an expert upon such subjects, whom they had consulted, that their stretching process was an infringement upon the defendant corporation, and their own computation of damages, which it appears they made, reached a sum far beyond their ability to liquidate.

I conclude, therefore, that the settlement made with the defendant corporation, was not the offspring of fraud, but was the only method, which seemed open to the plaintiff, to end a litigation and controversy, which, if protracted, must sooner or later end in disaster and loss to the corporation and the stockholders themselves.

But it is urged by the counsel for the plaintiff, that the transfers of the patents were not the act of the trustees, but of Finn, individually, and that they are, for that reason, void, and in addition that the trustees themselves, if consenting, had no power to make the transfers. That the act was *ultra vires*. The fact of actual participation of the three trustees, Finn, Atwood and Sheldon, in the negotiations for the settlement, is abundantly shown.

The principal part of the negotiation was clearly intrusted to Finn. But the terms agreed upon were submitted to,

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and were adopted by his associates. Of the stockholders, Dickinson and Pearce advised it, and it cannot but be that other stockholders, residents of the city, knew of the transaction at the time it was being consummated.

They must have known of the judgment of the federal court, and the award of damages; their interest in the corporation would lead to such conclusion. There is no evidence that any stockholder, interposed to prevent the transfer.

Many of the stockholders, doubtless felt, as Atwood expressed himself, and were disposed to give up the whole matter, if a settlement could only be effected upon such conditions. The book of minutes of the plaintiff, kept by its secretary, has been given in evidence; it contains a record of a meeting under the date of April 10, 1873, of a majority of the directors, Finn and Atwood being present. The correctness of the minutes is testified to by the secretary, Mr. Plume, who was a stockholder. At this meeting a resolution was adopted, which, after reciting the pendency of the action in the federal court, and its adverse decision, and *the proceedings to assess damages*, the payment of which the company had not the means, except by a sale of its property, authorized the president to negotiate and conclude a settlement, between the defendant corporation and the plaintiff, of the amount of damages recovered *or to be recovered*, with costs of the suit, and that in order to pay the same, the whole or so much as might be necessary of the property, patent-rights, assets and effects, belonging to the company, be sold and transferred; that the president be and he was authorized to sell, assign, transfer and convey the same, or any of them, or any part thereof, for the best price he could obtain, and to make, execute and acknowledge and deliver all deeds, assignments, transfers, and other instruments in writing necessary, and to affix the seal of the corporation thereto, and sign his name thereto as president.

This resolution, if adopted by the requisite vote of the trustees, would seem to authorize the president to make the

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transfers in question, unless the act was one the trustees were not authorized to perform.

It is urged, on behalf of the plaintiff, that the transfers of this property destroyed the corporation, and that the trustees of a corporation have no power to perform any act which would lead to such result.

The first answer to this objection is, that the transfers of this property did not destroy the corporation.

Its existence did not depend upon its title to the patent rights and licenses in question. It might acquire other means and processes for continuing its work.

But I apprehend a large view of the subject would embrace, as chief cause of the failure of the then purposes of the corporation, the fact that it relied for success upon a patent, the processes under which was an invasion and infringement of the rights of others.

This element of destruction to its business was present so soon as it commenced operations, and must at some time culminate in disaster.

I am referred by the learned counsel for the plaintiff to *Abbott agt. Hard Rubber Company* (33 Barb., 578) as an authority condemnatory of the act of the trustees in making the transfers. That is a very important case; it places the duties of directors and trustees of corporations upon grounds which must surely command the approval and respect of every court.

It declares that directors of a corporation are its agents to manage its affairs and carry out the purpose and object of its formation, and not to inflict upon it political death. That an act, which to all intents terminates the corporation by taking from it its power to fulfill the purposes of its organization, is not within the powers of its directors. *Smith agt. N. Y. C. Stage Co.* (18 Abb. Pr., 419); *Copeland agt. Citizens' Gas Company* (61 Barb., 60); *Frothingham agt. Barney* (6 Hun, 366); *Taylor agt. Earle* (8 id., 3); *Gray agt. N. Y. and*

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V. S. S. Co. (3 *Hun*, 383), all announce the same doctrine declared in *Abbott agt. Hard Rubber Company*.

But the case under consideration differs "*toto cælo*" in its essential facts, from those cited.

The corporation had, in substance, a judgment against it for nearly \$100,000 which it could not evade, and had no means to discharge except by applying its property. This judgment was the result of its operating one of the principal patents which largely represented its capital stock. It could not pay the debt, and it was perpetually enjoined from using the processes under the patent. The debt must be paid. It is certainly the duty of the trustees to pay the corporate debts and to apply the corporate property and means to this end, although it should exhaust them; and if that is to destroy the corporation, such result cannot be avoided. A corporation can no more avoid the payment of its debts than an individual can evade his honest obligations. The individual must apply his property to satisfy the just demands of his creditors until they are exhausted, although the result be the destruction of his business and his impoverishment.

Could there have been any other means adopted to liquidate the claim of the defendant corporation than by the transfer of its property? If there could, they should doubtless have been employed, before resorting to the extreme measure of parting with the patents.

None, even now, has been suggested; the case discloses none.

The justice of the judgment of the federal court must be conceded. It is apparent that the trustees must have acknowledged it.

Under such circumstances, was it more than justice and equity demanded that the offending patent, which could no longer be operated by the plaintiff, should be delivered to the injured party that it might no longer be used to the defendants' damage?

This patent was in fact now valueless to the plaintiff, and

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in itself furnished no valuable or meritorious consideration for the release of the claim of damages. All that the plaintiff had in effect to transfer of value, was the hat blocking patents, and the outstanding licenses; and the latter, in so far as they authorized the use of the stretching machines, it was proper that they should be revoked or surrendered. In my judgment its inability to use the patents for stretching hat bodies was of itself sufficient to vitally impair the work in which the plaintiff was engaged, for the evidence shows that the process of blocking hats, was dependent upon that of stretching. That the practical value of the patents consisted in their being used together.

The plaintiff's patents for blocking hats without doubt contained improvements of value. These consisted of an expansible hat block, a banding ring so arranged as to be capable of a reciprocating motion, up and down, and double jointed levers operating by a centrifugal motion, to press the brim outward in a uniform manner.

But the defendant corporation owned valuable patents for blocking hats. It claims that its patent was the oldest, in fact the "bottom, patent."

The original, or Eickmeyer blocker, embraced the block, plates for clamping the brim, and a banding ring.

The plaintiff's patent, however, contained conceded improvements.

But the defendant corporation urged upon the trial that the plaintiff's improvements were upon apparatus secured to defendant by its patents, and that the plaintiff used, in addition to its own improvements, the apparatus covered by the defendants' patents, and that they had contemplated prosecuting the plaintiff for an infringement of their rights under their patents for blocking, also.

Assuming however, that the plaintiff's improvements were truly useful and new, and that they could not be interfered with, was the transfer of the patents for blocking, under the circumstances void?

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It was the only property plaintiff had to give in settlement of the defendants' claim for damages, and, deprived of the use of the patent for stretching, it was practically useless.

It is true that Mr. Sheldon testified that the plaintiff's blocking patents had great value, largely in excess of the claim of the defendant corporation, for damages; but if he truly believed at the time that they had so great value, and that the transfer could be questioned for that reason, why did he not take steps to resist it when the matter was under consideration and about to be accomplished? Why did he not suggest some other available way of settlement, and why did he leave the country directly the transfer was made, and remain abroad for several years, with knowledge of the fact, that the patent had passed to the defendant corporation, in satisfaction of its claim? Why did he acquiesce in the transfer when it was finally decided upon?

But the value now placed by Mr. Sheldon upon these patents, was based upon their receipts in connection with the hat stretching patent, and the two patents could only be practically and profitably used together.

That being so such receipts are no safe guide to determine the value of the improved patents for blocking. The evidence decidedly preponderates in the direction that the value of these patents did not, in any degree, approximate to the amount of damages awarded.

I cannot, therefore, conclude that in the transfer of these patents the trustees of the plaintiff, who directed it, did any thing more than apply its only available means to the payment of an acknowledged indebtedness, and that the value of the property transferred was not in excess of the amount of the defendants' claim.

I do not think that any such value has been established, with respect to these patents, as to call upon a court of equity to invalidate the transfers.

But it is further urged by the learned counsel for the plaintiff, that the transfer was void, under the provisions of the

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Revised Statutes (*part 1, chap. 18, title 4, sec. 4*), in these words: "It shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever, and every such transfer and assignment to such officer, stockholder, or other person or in trust for them or their benefit shall be utterly void"

It is quite evident, from a perusal of the whole section, from which the above is extracted, that it was designed to interdict transfers of property, by a corporation, which had committed, in effect, some act of bankruptcy, in a refusal or omission to pay its notes, or other evidences of debt, and which was in fact insolvent.

It may be well questioned, whether the corporation could invoke the aid of this statute to avoid its own act; what complaining stockholders might do in its name, is another question.

But waiving that, there is no evidence which brings the plaintiff within the terms of the act in question.

It had not refused the payment of its debts. There is no evidence that it owed any thing, except the damages in question to the defendant corporation. No creditor has appeared to object to this transaction.

After transferring the patents to the defendant corporation, it still had the control of funds, a few thousand dollars, which was turned over to Sheldon.

What the condition of the plaintiff would have been, had no arrangement or settlement been effected, and the defendant corporation had been compelled to sell under process, the plaintiff's property to pay a judgment for damages, it would be useless to speculate. There is no reason, however, to believe that the fruits of such sale would have paid the damages. The learned counsel for the plaintiff further contends that in no event did the transfers secure the assent of a majority of the trustees of the plaintiff.

By the original articles of association of September, 1867, it was provided that the number of trustees of the corporation

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should be three, who were named therein, as follows: Julius Sheldon, Archibald T. Finn and Charles Atwood, Jr., who were to manage the affairs for the first year.

The by-laws also provided that the board of directors should consist of three persons, to be elected by ballot at each annual meeting of the stockholders, or in default thereof, at a special meeting to be called for the purpose, and in case of no election the old board should hold over until the next general election, and their successors are appointed.

At a meeting of the directors held on the 5th day of December, 1870, at which were present A. T. Finn and Charles Atwood, Jr., it was resolved, that four more directors be added to the direction. And the record of the annual meeting, held at the office of the company, on the 6th of October, 1870, shows that an election was held and A. T. Finn, George Dickerson, Edmund Tweedy, H. O. Pearce, Julius Sheldon, Charles Atwood, Jr., and Joseph Plume, in all seven persons, were declared chosen directors for the ensuing year.

At a subsequent meeting of the directors it was declared that their number should be six.

Of the persons chosen on the 6th December, 1870, as trustees, two, Dickerson and Pearce, declined to serve and resigned at a meeting of the directors held on the ninth and John J. Silcock and Jacob Surrenus were chosen as trustees in the place of Dickerson and Pearce.

The records do not show whether Silcock or Surrenus accepted the places, but they have attended no meeting of the trustees.

Plume was secretary of the board, and although present at the meetings he never records himself among the list of directors present, except in one instance and that was at the meeting on the 9th December, 1860.

As far as H. O. Pearce is concerned, while it does not appear that he ever acted as a trustee, it is shown that he advised the settlement, and Plume was present at, and

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recorded the proceedings of, the meeting of the 10th April, 1873.

As no certificate was filed as required by section 2 of the act of April 11, 1860, it is quite clear that the number of trustees was never increased, and that the proceedings, in that direction, above referred to, were, in law, as they appear to have been regarded by the parties in fact, a nullity, and that the only persons qualified to act as such were the three persons named in the original certificate who appear only to have actually taken part in the management of the affairs of the corporation and who are found to have authorized the transfers.

This action is brought in the name of the corporation. It is in evidence that from and after the transfers of its patents to the defendant corporation it never prosecuted any business, and that it had in fact ceased to use its franchises.

The stockholders, with knowledge of the settlement with the defendant corporation, and the terms of which some actually approved and advised, have taken no steps to disturb the same.

There has been an acquiescence through silence for many years. The defendant corporation, in the meantime, having effected improvements on the blocking patents has used them in its business in connection with its stretching processes.

No meeting of plaintiff's trustees or stockholders has been held since April, 1873, until just before the commencement of this suit.

On the 27th day of January, 1877, according to a minute thereof produced, stockholders representing 1,724 shares of stock met and proceeded to the election of directors and the result reached was that *five* persons, Julius Sheldon, James L. Todd, John Silcock, Jacob Surrenus and L. Buckman each received 1,724 votes. As each of the five persons received the same number of votes it is impossible to state what persons were elected if the election were otherwise regular. The record, however, says that the *five* persons were chosen.

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On the 12th of February, 1877, a meeting of these five persons, or some of them, was held, and Julius Sheldon was named as president.

The by-laws of the corporation provide, that an election of trustees, shall be held on the first Monday of October of each year, and further, that if the election shall not be held on that day, a special meeting of the stockholders shall be called for that purpose, and that the old board should hold over until the new one should be elected.

Such meeting of stockholders could only be called by the old board of trustees; how it was summoned does not appear, nor does the records show that notice was given to all the stockholders, of the proposed meeting. But I do not consider it important to determine whether or not, the old directors were displaced by the meeting of the 27th of January 1877.

It does not appear that any authority was given at this meeting of stockholders, nor at any other meeting of them, or of the newly chosen trustees, for the commencement of this action, nor that any inquiry has been directed to be made in respect to the transfers of the patents and licenses, to the defendant corporation.

For all that appears, the commencement of this action is the individual act of Sheldon, who verified the complaint. Considering the circumstances of this case, the time which has elapsed since the transfers were made, the fact that the corporation has not transacted business for many years, the relation which Sheldon bore to the transfers, and the part he took in the negotiations which led to them, his receipt of \$8,000 of the funds of the corporation, contemporaneous therewith, and his desertion of his duties for so long a time, would seem to demand that there should have been some distinct, affirmative direction, proceeding from those interested, authorizing the commencement of this action in the corporate name.

There are some considerations, which bear upon the equities of the case, and which go far to support the conclusion, to which the facts above stated lead, that this action cannot be

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sustained. The complaint demands that the transfers be set aside, and the property restored to the plaintiff; yet no offer is made with respect to the payment of the defendants' damages reported by the master. No exceptions have ever been filed to the master's report.

No relief could, under the circumstances, be granted except on the condition of payment of these damages, which would amount, principal and interest, at the present time, to \$135,000. It is not averred that the plaintiff is either able or willing to pay the damages; its present ability is not as great as when the transfers were made. One who asks equity must do equity. Plaintiff should at least have tendered payment, before suit brought, or the complaint should have offered it. It is silent on this subject.

The licenses transferred cannot be restored for the reason that under them the licensees were allowed to use the stretching machines, and, besides, new licenses have been issued by the defendant corporation, in their place, and the blocking machines have been, in the meantime, added to and improved by the defendant corporation. The "*status quo*" cannot be restored. After a full examination I find nothing in the case to impeach the honesty and good faith of the defendant corporation. That corporation had the right clearly to demand that the patent for stretching hats should be so placed that it might no longer be used to its injury; and as to the residue of the property assigned I cannot find that it amounted to more than an indemnity for the damages in satisfaction of which it was agreed to be taken.

The defendant corporation has acted upon the basis of the settlement for many years, and has taken no steps to enforce its decree obtained in the federal courts, and which, in reliance upon the settlement, it appears to have wholly abandoned. The silence of the stockholders, of the plaintiff and its officers for five years and upwards was, in itself, sufficient to lead the defendant corporation to believe that the settlement was satisfactory to them.

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Parties asking to vacate settlements and transfers of property should move without delay, so soon as they are made known, unless there exists some disability.

No fact appears in the case which was not known to all the persons interested in the plaintiff when the settlement was made and the transfers completed in the year 1873.

A court of equity does not regard, with favor, delays of this character. Such laches is evidence of weakness and not of confidence in the equity and justice of a complainant's case. No excuse for the delay appears.

And while I would be unwilling to abate any thing of the responsibility resting upon trustees of a corporation with regard to the management of the corporate property, and without, in anywise, authorizing any transgression by them of the good rules governing their action in the control and disposition of the corporate property and assets, I am still of opinion that in this case equity is well satisfied by allowing the settlement and transfers made in May, 1873, to stand undisturbed.

Under this conclusion the complaint must be dismissed, with costs.

Potter & Markham agt. Carpenter & Co.

SUPREME COURT.

POTTER & MARKHAM, appellants, agt. R. CARPENTER & Co.,
respondents.

Costs — Disbursements — What printing fees are taxable as a disbursement in the court of appeals, where the cases are printed for both courts at the same time.

It seems, that it is not the usual expense of printing cases that may be taxed by the prevailing party but the actual price paid. (This seems to be adverse to Consalus agt. Brotherson, 54 How., 62.)

Where the appellants, on appeal to the general term, printed thirty copies of case, ten copies for general term, and after affirmance at general term printed six additional pages and added to the twenty copies first printed for the court of appeals:

Held, that the appellants were not entitled to charge for printing the whole case in court of appeals but only for printing the additional pages and the expense of printing the twenty additional copies more than was required for the general term.

Third Department, General Term, November, 1877.

Before LEARNED, P. J., BOCKES and BOARDMAN, JJ.

THIS action was tried before a referee who reported in favor of the defendants for a balance against the plaintiffs.

On appeal the case was affirmed at the general term, third department.

The case contained 108 printed pages and the appellants, in the first instance, printed ten copies for the general term and twenty for the court of appeals and paid therefor one dollar and fifty cents a page for the thirty copies.

After the affirmance at the general term the appellants printed the judgment in that court with the notice of appeal and opinion, making six additional pages, which were added

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to the twenty copies first printed for the court of appeals, making 114 pages.

The court of appeals reversed the judgment of the general term, with the costs of that appeal to be paid to the plaintiffs, and sent the case back to the referee to make additional findings.

Upon taxation of the costs the plaintiffs claimed to recover for printing in the court of appeals, for printing the whole case at one dollar and twenty-five cents a page, being the usual price paid in Troy for twenty copies.

The defendants objected and the clerk of Rensselaer county allowed only twenty-two dollars, being nine dollars for printing the six additional pages and thirteen dollars for the expense of printing the twenty additional copies, more than it would have cost to print the ten copies for the general term.

On appeal to the special term judge INGALLS affirmed the costs as taxed by the clerk.

The plaintiffs appealed to the general term where it was argued November, 1877, by

E. F. Bullard, for plaintiffs. He claimed, first, that the plaintiffs were entitled to the *usual expense* of printing without regard to the price paid and whether it was ever paid; that was a question between the party and the printer and cited the decision of the same court made at general term (*Consalus agt. Brotherson*, 54 *How.*, 62). He contended the court should adopt but one rule in like cases; second, that at all events the costs should be divided, *pro rata*, between the two courts, which would apply two-thirds to the costs of printing in the court of appeals.

Esek Cowen, *contra*, contended that the plaintiffs were compelled to print the ten copies for the general term and he should only be allowed what it would cost for the twenty copies, as extra copies, being the six dollars allowed.

The general term affirmed the order of the special term, with ten dollars costs.

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SUPREME COURT.

WIDMER agt. GREENE and THOMPSON.

Injunction restraining defendants from producing a play called M'liss — right to perform — Jurisdiction of state court.

A state court has jurisdiction of an action to determine the rights of the respective parties under an agreement by defendant with plaintiff, for the exclusive right to have and perform a certain play.

Where, by an agreement dated February 7, 1878, the defendants in consideration of the covenants therein contained, conveyed and transferred to the plaintiff the sole right for America, to have and perform the play written by them, entitled M'liss; it was further agreed that unless the play was performed at least fifty times within one year from the date of the agreement, and forty times in each succeeding year, all the rights of plaintiff should cease and determine at the option of defendants, and that plaintiff at any time within one year on the tender of \$5,000, should be entitled to an absolute conveyance of the right and title of said play from defendants, and that no change should be made in the contract, except in writing signed by the parties :

Held, that this agreement vested the plaintiff (until she had failed to keep some of the covenants on her part) with the sole right to "have and perform" the play in question in America.

Held, further, that plaintiff was entitled to an injunction restraining McDonough, to whom (without plaintiff's consent) defendants claim to have transferred the right to produce said play in America, from producing the same.

Plaintiff by the agreement succeeded to all the rights which the defendants had to produce the play in question in America, and the defendants parted with all right to authorize any other person to produce such play in America, as long as the plaintiff kept her agreement with them.

As the assignee or vendee of the defendants the plaintiff is entitled to the aid of this court as against those who seek to perform such play without her consent.

The rule that where there is a dispute as to the construction of an agreement between the parties, the court will not grant an injunction until

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the effect of the agreement has been established at law, does not apply to this case.

Special Term, September, 1878.

MOTION to dissolve temporary injunction granted by judge DONOHUE to Kattie Mayhew, whereby Messrs. Green and Thompson, John E. McDonough and Messrs. Poole and Donnelly were restrained from producing a certain dramatization of Bret Harte's story of *M'liss*, at Niblo's theater.

A. J. Dittenhoefer, for plaintiff.

C. W. Brooke, for defendant.

LAWRENCE, J. — The objection to the jurisdiction of the court is not well founded. I am not called upon in this case to determine whether the plaintiff or the defendants Greene and Thompson have a valid copyright in the drama which is the subject of this controversy, nor to ascertain whether either of those parties is entitled to such a copyright (*Middlebrook agt. Broadbent*, 47 N. Y., 444; *Burrall agt. Jewett*, 2 Paige, 134). This case turns upon the rights of the respective parties under the agreement dated February 7, 1878, which agreement it is within the power of this court to enforce.

By the agreement Greene and Thompson, in consideration of the covenants therein contained, conveyed and transferred to the plaintiff the sole right for America to have and perform the play written by them, entitled "*M'liss*."

The plaintiff agreed to pay Greene and Thompson ten dollars for each performance of the said play, and five per cent of the gross receipts of each performance. "After the sharing limit is passed, or in case the said Mayhew shall perform the said play, on a certainty to herself, she is to pay to Greene and Thompson the said sum of ten dollars for each performance, and ten per cent of her certainty." It was further agreed that the plaintiff should make returns and remittances to the

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said Greene and Thompson, monthly, and that all payments should be made in gold coin of the United States or its equivalent.

It was further agreed that unless the play should be performed at least fifty times within one year from the date of the agreement, and forty times in each succeeding year thereafter, all the rights of said Mayhew in the play should cease and determine at the option of Greene and Thompson. It was further provided that the plaintiff should not make any transfer of her rights in the play without the written consent of Greene and Thompson, and that the plaintiff at any time within one year from the date of the agreement, on the tender of \$5,000 in gold coin, should be entitled to have and receive an absolute conveyance of the right and title of the said play, for America, from the said Greene and Thompson, and that no change should be made in the contract except in writing signed by the parties. This agreement vests the plaintiff, until she has failed to keep some of the covenants on her part, with the sole right to "have and perform" the play in question in America.

It does not appear that there has been such a failure on the part of the plaintiff. It does not appear that there have been any performances of the play by her since the agreement was executed, nor that she has omitted to make any payments which, upon such performances under the agreement, would become due to Greene and Thompson. She yet has time to perform the play fifty times before one year from the date of the agreement has elapsed, and also to obtain an absolute conveyance of the right and title for America, upon the payment of the sum of \$5,000. It is not pretended that the agreement of February 7, 1878, has been changed in the manner prescribed therein. Under these circumstances, I think it quite clear that Greene and Thompson were not authorized to make the transfer to the defendant, McDonough, which is referred to in the notice published in the New York Dramatic News, a copy of which is annexed to the complaint.

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By that notice Greene and Thompson notify "all whom it may concern" that "we, the authors and proprietors of 'M'liss,' have transferred to John E. McDonough the sole right to produce it in America," and they "caution all managers against any infringement upon our registered copyright." The sole right to produce the play called "M'liss" in America was precisely what Greene and Thompson had conveyed to the plaintiff by the agreement of February 7, 1878, and as the plaintiff had in no respect violated or broken that agreement, Greene and Thompson were not authorized to make a conveyance to any other person.

I have read over the voluminous affidavits which were presented upon the motion and also the correspondence attached to the complaint and answer, together with the affidavits of the respective parties, and I fail to see any reason why the plaintiff's right to determine how and by whom the play of M'liss should be brought out or performed has been forfeited or abridged by any thing which passed between Greene and McDonough. Negotiations were entered into with Mr. McDonough to bring out the play, and the parties appear to have nearly reached a satisfactory arrangement, but as soon as it was communicated to the plaintiff that McDonough was to play as an "attraction," as the plaintiff expresses it in her reply to the letter from McDonough on June 8th, she refused to make the arrangement. To this position she seems to have adhered throughout, and when notified by McDonough that he would produce the drama on the 12th of August, employing another actress in her place, she replied, "If you do I will enjoin you." As I view this case, the plaintiff, by the agreement of February 7, 1878, succeeded to all rights which Greene and Thompson had to produce the play in question in America, and Greene and Thompson parted with all right to authorize any other person to produce such play in America as long as the plaintiff kept her agreement with them. There is nothing in the agreement which requires the plaintiff to perform the play at any particular period of the year, and provided

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she performs it fifty times between February 7, 1878, and February 7, 1879, and makes the returns which the agreement calls for, her "sole right for America to have and perform" M'liss cannot be questioned or attacked. And, as the assignee or vendee of Greene and Thompson, the plaintiff is entitled to the aid of this court as against those who seek to perform such play without her consent (*Palmer agt. De Witt*, 47 *N. Y.*, 532; *Crowe agt. Aiken*, 4 *American Law Review*, 450; *Shook agt. Daly*, 49 *How. Pr. R.*, 366).

In *Palmer agt. De Witt* the court of appeals says: "The plaintiff has, for a valuable consideration, acquired the right to the first publication of this drama, as well as the right to represent the same upon the stage in the United States, and it is a right of pecuniary value. * * * As against the author and all the world the plaintiff has acquired, by the payment of a valuable consideration, an equitable right to the first printing and publishing of the drama here, and the right is within the cognizance of a court of equity."

And in *Shook agt. Daly*, where both parties claimed title by purchase of the manuscript from one Michaelis, judge CURRIE, in delivering the opinion says: "The defendant Daly states that he has substantially constructed a new and original play in the place of *Rose Michel*. If that has been done it is no answer to this application for an injunction. The author and his assignees, be they citizens or aliens, so far as the manuscripts and their rights therein are concerned, are protected by the law, and these cannot be impaired or infringed upon either directly or indirectly."

The defendant McDonough and the other defendants are seeking to perform the play against the plaintiff's consent. Neither he nor the defendants, the managers of the theater, can have any other rights than Greene and Thompson, and the latter, as long as the agreement of February 7, 1878, is in force, can confer no authority on any one to perform or produce "M'liss" without the plaintiff's consent. The learned counsel for the defendant has referred me to Curtis on Copy

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rights, wherein the rule is laid down that where there is a dispute as to the construction of an agreement between the parties, the court will not grant an injunction until the effect of the agreement has been established at law. The soundness of this proposition is not denied, but in this case there can be, in my opinion, no dispute as to the construction which should be given to the agreement between the plaintiff and Greene and Thompson, and the plaintiff never acquiesced in the arrangement that the play should be produced with another person as "an attraction."

For these reasons I am of the opinion that the injunction granted by Mr. justice DONOHUE should be continued until the case can be tried.

Leonard agt. Leonard.

SUPREME COURT.

MICHAEL LEONARD agt. JOHN LEONARD.

Judgment debtor — death of — proceedings to enforce payment out of his estate under section 376 of the Code of Procedure — who may be summoned.

When the statute (sec. 376 of the Code of Procedure) speaks of "tenants of real property owned by the judgment debtor," it means *his* tenants, and does not apply to persons holding under a deed in hostility to him, and those who claim through him.

The judgment debtor died leaving the judgment unpaid. At his death he was seized of certain real estate in the city of New York. He left a widow and two children, and by his will his widow was to have a monthly allowance from the income of his estate in lieu of dower, and the principal of the estate was given to his children. The real estate was sold by the municipal corporation for taxes, and a lease for 1,000 years was executed to Charles Reed. The proceedings are under section 376 of the Code, and the summons has been served upon the widow, her two children and Reed:

Held, that the proceedings as to Reed could not be upheld, as he does not hold as a tenant of the judgment debtor, but under a deed made in hostility to him.

Held, further, that the interest of the heirs or devisees is too remote and trifling to authorize these proceedings.

Trial Term, June, 1878.

Henry Parsons, for plaintiff.

Ex Judge Albert Cardozo and Richard S. Newcombe, for the lessee and heirs.

VAN VORST, J.—The plaintiff recovered a judgment against the above named defendant on the 11th day of August, 1866, for \$502.47.

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In October following the judgment debtor died leaving the judgment unpaid. At his death and for some time previous the judgment debtor was seized of certain real estate in the city of New York. He left a widow and two children. By the will of the defendant his widow was to have a monthly allowance, from the income of his estate in lieu of dower — to the children the principal of the estate was given.

The proceedings of the plaintiff now considered are commenced under section 376 of the Code.

The property which is sought to be reached, and in effect applied to the payment of the judgment, is the real estate of the judgment debtor, which it is claimed passed under the will.

This real estate was sold by the municipal corporation in September, 1865, before the death of the judgment debtor, to satisfy taxes due thereon.

In pursuance of this sale a lease was executed by the municipal authorities to Charles Reed, who was the assignee of the certificate of sale, for the term of 1,000 years, from the 14th day of September, 1865, and he now holds the premises under the lease, and is entitled to the premises and all thereof, for the term of the lease, to the exclusion of all who claim through the judgment debtor; this includes the widow and children, as it does the plaintiff himself, claiming under a judgment, against John Leonard. The summons in this proceeding has been served upon the widow, her two children and Reed. As by section 376 of the Code, the heirs, devisees, legatees or tenants of real property, owned by the judgment debtor may be summoned to show cause, the proceedings as to Reed cannot be upheld. He does not hold as a tenant of the judgment debtor, but under a deed made in hostility to him, and is entitled "to have and to hold said premises against owner or owners thereof, and all claiming under him or them," so the lease reads.

When the statute speaks of tenants of real property "owned by the judgment debtor," it means *his* tenants, and does not

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apply to persons holding under a deed in hostility to him, and those who claim through him.

It does not appear that there is any estate of the judgment debtor in the hands of either of the parties who are summoned under the section of the Code now considered.

But it is suggested that the tax sale resulted only in a lease, and that whatever may be the duration of its term, there is an interest in the heirs or devisees, which an execution can reach.

It is considered that such interest, after the lapse of 1,000 years, is too remote and trifling to authorize these proceedings.

Courts of justice are moved only to the consideration of substantial rights and remedies.

There should be judgment dismissing the proceedings, with costs.

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N. Y. COMMON PLEAS.

In the Matter of BENJAMIN PAGE, a lunatic.

Lunatic — proper party to be appointed committee of the estate and person — heirs or next of kin — Appeal.

The selection of a committee of a lunatic by a referee appointed for that purpose, is a matter of judicial discretion with which the court should not interfere, unless he has selected an improper person or one who is disqualified, or one whose situation is such as to warrant the belief that the interests confided to him may not be properly attended to.

Whether a relative or stranger is to be preferred, should be determined in the particular case, in view of all the circumstances, and not by the application of any general rule, for there is none except that *heirs* or *next of kin* are not disqualified if the court or its officer in the exercise of a sound judicial discretion thinks proper to appoint one.

Matter of Owens (5 Daly, 288) explained and limited.

It seems that an appeal may be taken from an order confirming the report of a referee as to who was a suitable person to be appointed a committee of the person and estate of a lunatic.

General Term, April, 1877.

THIS is an appeal from an order, confirming the report of a referee, to whom, by an order of this court, it was referred to inquire and report, among other things, who was a suitable and proper person to be appointed a committee of the person and estate of the above-named Benjamin Page, a lunatic. The applicants for such appointment, before said referee, were two, to wit: Mr. Stephen H. Olin and Mr. Robert L. Keen. Mr. Olin is in no way related to the lunatic, Mr. Keen is his first cousin. The other relatives of the lunatic are Mrs. Croghan and Mrs. Brown, aunts of the whole blood, and Mrs.

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Clarke, Mrs. Madeira, Mrs. Brent, Mrs. Blackwell and Dr. David Page, aunts and uncle of the half blood. The lunatic is unmarried and has no father, mother, children brothers or sisters living, and there are no descendants of any such child, brother or sister. Mrs. Brown resides abroad, has not appeared in this matter, and takes no part therein. Mrs. Croghan is the petitioner, and alone requests the appointment of Mr. Olin. All the other relatives unite in asking to have Mr. Keen appointed such committee.

The referee reported in favor of the appointment of Mr. Olin.

The confirmation of this report was opposed by the other parties to the proceedings, and in their behalf it was asked that the motion for that purpose should be denied; and that an order might be entered appointing Mr. Keen such committee. The motion to confirm was granted, and an order was entered confirming the report.

VAN BRUNT, J., in confirming the report says: "Under the decision in the case of *Matter of Owens* (5 *Daly*, 288) I am compelled to confirm this report, but I cannot do so without expressing my dissent from the doctrine enunciated in that case, that next of kin are excluded from appointment as committees of person or estate of lunatics. I don't think the authorities will support such a doctrine."

D. S. Ritterband, for appellants. *Michael H. Cardozo*, of counsel.

I. The order is appealable (*sec. 1, ch. 270, page 592, Laws of 1854*).

II. The learned referee, in his opinion, says: "No question is raised by counsel as to the integrity, capacity or fitness of either of the gentlemen named, and the only question which arises is as to the rule which should guide the referee in the selection of a committee." The referee cites a case, entitled, *In the matter of Owens, an Idiot* (5 *Daly*, 288), and

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from that authority, and the cases in the opinion therein referred to, deduces and evokes a rule or principle that a relative, as such, is excluded from an appointment as such committee; and, in view of this, he reports in favor of the appointment of Mr. Olin as the committee of the estate and person of the lunatic.

We submit that the conclusions which the referee seeks to draw from the two cases in this court, and by which he insists he is governed, were not of controlling authority on the question now before the court, and certainly do not decide that a relative, as such, is excluded from an appointment as such committee.

We insist that a relative is always preferred as the committee of the estate and person of a lunatic, rather than a stranger (*Matter of Livingston*, 1 Johns. Ch., 436; *Lamoore's Case* [1860], 11 Abb. [N. S.], 274; *In the Matter of Taylor* [1842], 9 Paige, 611; *Crary's Spec. Pro.*, vol. 2, ch. 18, p. 15 [2d ed.]; *Barbour's Chancery Practice*, vol. 2, p. 236, book V, ch. 6, [2d ed.]; *Wait's Practice*, vol. 6, p. 426; *Hoffman's Chancery Practice* [1839, 1st ed.], vol. 2, pp. 258, 260; 1 *Bouv. Law Dic.*, p. 297).

From England comes our law in relation to persons of unsound mind; the principles there determined, the rules there established, in the absence of legislation, should govern here. The authorities in the courts of that country unite in giving the preference to a relative (*Elmer on Practice in Lunacy* [5th ed.], 1872, p. 25; *Phillipps on Lunacy*, p. 281; *Shelford on Lunacy*, p. 131; 2 *Law Lib.*, p. 83; *Bacon's Abridgement* [Bouvier's ed.], vol. 5, p. 12), where it is said, "In the appointment of committees, relations, unless there is some specific objection, are preferred to strangers. It is no objection in modern practice, though it was so formerly, that the committee of the person is entitled, as heir-at-law, upon the death of the lunatic, to his real estate. That he is the next of kin to the lunatic, and may come in for a share of the personal property under the statute of distributions, has

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never been considered as an objection." (*Stock on Non Compos Mentis*, p. 121, *et seq*; 9 *Law Lib.* [N.S.], II, p. 71; 1 *Fonblanque's Eq.*, 53 [note o]; *Petersdorff Abm.* [2d. ed.], vol. 5, p. 409 [I], where it is said that "relations are in general appointed in preference to strangers, unless some specific objection be urged") (*Dormer's Case* [1724], 2 *Peere Wms.*, 262.) Here the uncle of the lunatic was appointed committee. (*Ex parte Ludlow* [1731], *id.*, 635; *Ex parte Lyne* [1735]. *Cas. Temp. Talb.* 142.) The next of kin was, together with her husband, appointed committee of the lunatic's estate. (*Ex parte Grimstone* [1772], *Amb.*, 706.) The heirs-at-law of the lunatic were intrusted with the custody of his estate. (*Ex parte Cockayne* [1802], 7 *Vesey*, 591 and note.) The lunatic's brother of the half blood was made committee of his estate and person. (*Ex parte Le Heup* [1811], 18 *Vesey*, 221.) Where an uncle of the lunatic was made committee. (*Ex parte Pickard* [1814], 3 *Ves. & Bea.*, 127.) Here the lunatic's sister was one of the committee. (*In re Lord Bangor* [1818], 2 *Molloy* [Ir. Ch.], 518; *Ex parte Farroh*; *In re Adams* [1829], 1 *Russ and Mylne*, 112.) In this case the lord chancellor granted the application of the sister of a lunatic and her husband to be appointed committee of the person and estate of the lunatic. (*In the Matter of the Earl of Lainsborough* [1826], *Lloyd & Goold Temp. Plunk.*, 503.) Here the heir-at-law of the lunatic was made committee of his estate. (*In re Hussey* [1828], 1 *Molloy*, 226; *In re Persse* [1828], 1 *Molloy*, 439; *In re Blair* [1836], 1 *Mylne & Craig*, 300.) The heir-at-law of the lunatic was committee of her person and estate. (*In the Matter of Webb* [1846], 2 *Phillips*, 10, 532; *Re Watkins* [1846], 1 *Cott*, 225; *In re Meux* [1818], 2 *id.*, 106, 107 [n.]; *Leaf agt. Coles* [1852], 1 *DeG., McN. & G.*, 417.) Where it appears that a brother of the lunatic was appointed the guardian of his person and receiver of his estate. (*Ex parte Mount* [1851], 21 *Law Jour. Rep.* [N. S.], Ch., 221.) The heir-at-law, who, together with one other person, was also

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next of kin, was committee of the person of the lunatic. (*In re Pugh* [1853], 3 *DeG., McN. & G.*, 416.) Where the father was made committee of the person and estate of his lunatic son. (*In re French* [1868], 37 *Law Jour. R. [N. S.]*, 537.) The sister of a lunatic and her husband were appointed such committee. (*In re Strickland* [1871], *L. R.*, 6 *Ch. Ap.*, 226.) The heiress-at-law and next of kin were made such committee. (*In re Wynne* [1872], *L. R.*, 7 *Ch. Ap.*, 229.) The lunatic's wife was made committee. (*In re Scarlet* [1873], 8 *id.*, 739.) The committee of the person was the heiress-at-law and sole next of kin of the lunatic, and the committee of the estate was their son. Elmer says: "Relatives are preferred to strangers, unless there is some specific objection to them; the former rule of excluding them on the ground of interest being now disregarded." In *Ex parte Cockayne*, lord ELDON held that the old rule that the next of kin of a lunatic, if entitled to his estate upon his death, was not to be committee of the person, is not now adhered to. This is not only exploded, but, consanguinity, though it confers no positive right, is now always considered as a considerable recommendation in the selection of a committee (*Perkin's note to the case, citing Lady Mary Copes, 2 Cha. Cas.*, 239).

III. So much of the order from which this appeal is taken should be reversed; and as all the facts are before this court, and there is no dispute as to the fitness of Mr. Robert L. Keen, the person proposed by the relatives of the lunatic, an order should be entered appointing him the committee of the estate and person of the lunatic upon his executing such a bond as the referee has reported to be proper, and under the conditions recommended by the referee.

G. L. Rives for respondent.

I. The order is not appealable (*Laws of 1874, chap. 446, tit. 2, sec. 1; Matter of Mason, 1 Barb.*, 436; *Matter of Owens, 5 Daly*, 288; *Matter of Griffin, 5 Abb.*, [N. S.], 96;

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Black's Case, 18 *Penn. State Rep.*, 434; *Lamoree's Case*, 11 *Abb.*, 274; *Richard's Case*, 15 *Abb.* [*N. S.*], 6).

II. The court will not disturb the referee's report, unless it appears that it has appointed an improper person (*Creuze agt. Bishop of London*, 2 *Brown's C. C.*, 253; *Garland agt. Garland*, 2 *Vesey, Jr.*, 137; *Bonersbank agt. Collasseau*, 3 *Vesey*, 164; *Thomas agt. Dawkins*, 3 *Brown's C. C.*, 508; *S. C.*, 1 *Vesey, Jr.*, 452; *Tharpe agt. Tharpe*, 12 *Vesey*, 317; *Matter of the Eagle Iron Works*, 8 *Paige*, 385; *In re Lord Bangor*, 2 *Malloy*, 519; *Lady Mary Cope's Case*, 239; *Shelford on Lunacy*, 136; *Edward's on Referees*, 317, 599).

III. The court will not inquire into the referee's reasons.

IV. The referee in this case exercised his discretion.

V. The rule adopted by the referee was correct (*Matter of Owens*, 5 *Daly*, 288; 1 *Blk Comm.*, 305; *Dormer's Case*, 2 *P. Wms.*, 262; *Ex Parte Cockayne*, 7 *Ves.*, 591; *Ex Parte Ludlow*, 2 *P. Wms.*, 635; *Matter of Livingston*, 1 *Johns. Ch.*, 436; *Lady Mary Cope's Case*, 2 *Ch. Cas.*, 239; *S. C.*, 1 *Eq. Ca., Abr.*, 277; *Oxenden agt. Lord Compton*, 2 *Vesey, Jr.*, 69; *S. C.*, 4 *Brown's C. C.*, 231; *Neal's Case*, 2 *P. Wms.*, 544; *Ex parte Chumley*, 1 *Vesey, Jr.*, 296; *Matter of Taylor*, 9 *Paige*, 611; *Matter of Colah*, 3 *Daly*, 529).

VI. If the court reverses the order, it should refer it back to the referee (*Shelford on Lunacy*, 136; *Edward's on Referees*, 318, 599).

VII. The order appealed from should be affirmed with costs.

DALY, *Ch. J.*—Where an unobjectionable person has been appointed by the referee, it is not the practice of the court to disturb the appointment, upon the ground that a relative ought to have been selected, or the converse, or that a better selection from among the persons named might have been made. The selection of the committee, by the referee, is a matter of judicial discretion, with which the court should not interfere unless he has selected an improper person, or one

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who is disqualified, or one whose situation is such as to warrant the belief that the interests confided to him may not, be properly attended to (*Creuzer* agt. *Bishop of London*, 2 *Brown's C. C.*, 253; *Thomas* agt. *Dawkins*, 3 *id.*, 508; *id.*, 1 *Ves. Jr.*, 452; *In the Matter of the Eagle Iron Works*, 8 *Paige*, 386).

These were cases of the appointment of a receiver, but the rule is the same in respect to the appointment of a committee of a lunatic (*Lady Mary Cope's Case*, 1 *Eg. Ca. Ab.*, 277, *sd.* 3; *In re Lord Bangor*, 2 *Molloy*, 219).

If the referee had, in the exercise of his discretion, selected Mr. Olin instead of Mr. Keen, there would be no ground for interfering; but it is evident, from the referee's opinion, that he exercised no discretion in respect to Mr. Keen, that being a first cousin of the lunatic, he regarded him as excluded from appointment as a committee under, as he said, the principle of the decision of this court (*In the Matter of Owens*, 5 *Daly*, 288). It was certainly not my intention to hold in that case that a relative who may be pecuniarily benefited by the lunatic's death is disqualified from being appointed the committee of his estate; but, in looking at the language I used, I can see that it may well have misled and conveyed that impression to the referee. I meant to say that the court would exercise circumspection and care in appointing those who might be benefited by the lunatic's death, and whose intent and disposition it might be to lessen the lunatic's comforts, that his estate might be diminished as little as possible; not, however, that they were, for this reason or apprehension, disqualified, which would have been disregarding a long line of cases in which relatives have been appointed from justice *DORMERS' case* (2 *P. Wm.*, 263) to the present day. The rule is not that the relatives are to be preferred to strangers, nor strangers to relatives, but that the court, in the particular case, is to do that which is best for the lunatic, keeping in view the possibility of his recovery. "It is his benefit and comfort I am to take care of" said lord *MACCLESFIELD* in

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justice DORMERS, "and not heap up wealth for the benefit of his administrators and next of kin." Where the custody of the person and estate is to be united in the same committee, a relative may take more interest in looking after the lunatic's welfare and comfort, and feel more sympathy for him than a stranger would do. But whether a relative or stranger is to be preferred should be determined in the particular case in view of all the circumstances, and not by the application of any general rule, for there is none except that heirs or next of kin are not disqualified if the court or its officer in the exercise of a sound judicial discretion think proper to appoint one. Mr. Olin is a gentleman known to the court, and one in every way qualified for the discharge of such trust and I feel very reluctant to interfere with his appointment. It is, however, said in the referee's opinion that no question was raised at the hearing as to the integrity, capacity or fitness of either of the gentlemen named and as a large number of the relatives desired the appointment of Mr. Keen, it may be, for all that we know, that the referee, in the exercise of his discretion, would have appointed him had he not considered him disqualified under the construction which the referee gave to our decision in *The Matter of Owens*. I think, therefore, that it will be better to refer the matter again to the referee that he may be at liberty to select Mr. Keen if, in the exercise of his discretion, he thinks it more judicious to do so.

VAN HOESSEN, J., concurred.

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SUPREME COURT.

GEORGE MARK and others agt. THE HUDSON RIVER BRIDGE
COMPANY.

Negligence — Contributory Negligence — How far corporation liable for the reckless and needless acts of its servants, in removal of property of another which is upon or against their property — Damages — Jury.

The ferryboat of plaintiffs while on one of her regular trips across the Hudson river encountered a quantity of floating ice and was carried and lodged against the bridge of the defendant. Whilst the boat was resting against the bridge the defendant, by its servants, undertook to remove the same, and in doing so pulled the boat under the bridge, causing a part of that structure to fall upon the boat, doing her great injury. The boat was sunk and swept by the current to the lower part of the city, where she remained sunken for several weeks, and was finally raised by plaintiffs. In an action for damages, *held*, that, if the defendant's servants undertook to remove and did remove the boat at the request or by the permission of the plaintiffs, there could be no recovery, because the men became for that act the servants of the plaintiffs. If, however, there was no such request or permission, the defendant was answerable for any *wild, reckless or intended misconduct* of its servants.

The boat being there without any fault of the defendant, resting upon and against its property, it was the duty of the plaintiffs to remove her from that position, using all reasonable expedition and haste, consistent with the circumstances of the occasion.

If the plaintiffs failed in the discharge of this duty, then defendant had a right to do it. But in so doing, it was bound to use ordinary care, such care as an ordinary prudent man would exercise in the management of his own property. The defendant is not to be held liable for mere errors of judgment upon the part of its servants, but only for such acts, or such negligence, as the ordinarily prudent man would not have committed in regard to his own property.

Although the defendant was not insurers of the plaintiffs against all damage which might be caused in removing the boat, it may be made liable

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where the conduct of its servants was needless, reckless or useless, and which an ordinarily prudent man would not have been guilty of under the same circumstances.

Assuming that the boat was in collision and contact with the bridge by the fault of the plaintiffs, the act of the plaintiffs which put her there, or the neglect to remove her therefrom, is not to be deemed contributory negligence on their part, and therefore one which will defeat a recovery.

The act and conduct of the plaintiffs did not contribute to the injury in any way. The force which did the injury was an entirely independent one and intended to be applied. A wrong committed by the plaintiffs upon the defendant could not justify a second and independent one by the latter to the former. The injury done by the latter is the result entirely of a separate act of its own, and in the doing of which the plaintiffs were in no wise contributors.

Where, therefore, though all the consequences may not have been intended if what was done, was *wild* and *reckless*, and *intended*, and such as no ordinarily prudent man would have committed, the defendant must be accountable therefor, because the acts are entirely its own, and to them the plaintiffs do not contribute.

Held, further, that though the conduct of the defendant was negligent and reckless, still what it did was done to remove the property of the plaintiffs, which was injuring that of defendant, and which the plaintiffs should have taken away, and not to convert it to its own use. The removal of the boat having been accomplished, it was the duty of the plaintiffs to have taken possession of the boat as she was; and they had no right to abandon her. The plaintiffs could only recover for the injury and damage done to the boat by her removal and the fall of the bridge upon her. For all injuries which occurred after the plaintiffs could have relieved her there can be no recovery.

It is no error after a jury has come into court and delivered their verdict (the form of which showed they intended to add interest thereto) for the court to send them back to their room to calculate the interest.

Special Term, March, 1878.

MOTION by defendant at special term for a new trial upon a case with exceptions.

Matthew Hale, for the defendant.

Isaac Lawson, for the plaintiff.

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WESTBROOK, *J.* — This cause was tried at the Albany circuit in January, 1878, before Mr. justice WESTBROOK and a jury. The plaintiffs had a verdict for \$15,068.16. The cause was one of unusual importance and interest, the trial having been commenced on the 30th day of January, 1878, and its conclusion was reached on the fourteenth of February following. The character and issues of the action were as follows:

The plaintiffs were and are the proprietors of a ferry across the Hudson river between Troy and West Troy. On the 8th day of April, 1872, one of their steam ferry boats, the *George Mark* left her slip on the Troy side at a quarter to 10 o'clock P. M. to cross the river. It was claimed by the plaintiffs that the ice had broken up, and gone down the river some few days before. That during the day in question, the river had been comparatively free from ice, and when the *Mark* started, at the time just mentioned, there was nothing to indicate any danger. When, however, the boat had got two-thirds of the way over the river, she suddenly and unexpectedly encountered a large flow of very heavy block ice, which was carried with great rapidity by a freshet down the river, and though the boat was staunch and seaworthy, was provided with all proper and necessary men and machinery, and was well and skillfully managed in every respect, she was nevertheless irresistibly propelled by the force of the moving mass of ice, down the stream and against the north bridge of the defendant which crosses the river at Albany. The plaintiffs further claimed, that whilst the boat was resting against the bridge, the defendant by its servants, took possession of the boat and wrongfully, negligently and carelessly pulled it through and under the bridge, causing a part of the structure of the latter to fall upon the boat and then left and abandoned her to sink from the load upon her, to the great damage and injury of the plaintiffs.

The defendant, on the other hand, insisted that the boat was carried against its bridge by the carelessness and mismanagement of the plaintiffs. That the ice was, or could have

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been, seen in time to avoid it, that the boat was not equipped properly with either men or machinery, and, that solely in consequence of the fault of the plaintiffs, the collision of the boat with the bridge occurred. That the former struck the latter about 12 o'clock at night, or a little after, and from that time until after daylight, the plaintiffs did nothing to remove the boat, although the use of the bridge was thereby prevented. That by the contact the upper and under north cords of the bridge were broken, and also the south cords pulled apart. Under these circumstances, and at the request of the plaintiffs, the defendant's servants undertook to relieve the boat and bridge. That as the former was caught by the top of her gallows frame, and crowded against the latter by a large quantity of ice, it was deemed wise by the aid of jack-screws to press her down and under the bridge, using tugs on both sides of her to break up the ice. That whilst the defendant's men with all possible care and skill endeavored thus to relieve the boat, she suddenly passed under the north cords of the bridge, and lodged against the south ones. That as the cords were all broken, or strained apart, it became unsafe to jack the boat down under such south ones, and therefore three boats (two propeller tugs and ferry boat Olcott) were fastened to her, and she was pulled out. A part of the bridge fell upon her, which the defendant's men immediately removed, and then tied the ferry boat to the dock, when she was taken possession of by the plaintiffs. The defendant further claimed to recoup the damages which it had sustained by the collision of the boat with the bridge, insisting that the same was caused by the fault and negligence of the plaintiffs.

From the foregoing statement it will be seen, that the alleged cause of action of plaintiffs presented two questions: First, was the defendant liable to the plaintiffs for the injury done to the boat by pulling her under the bridge and thus causing a part of that structure to fall upon her? Second, was the defendant responsible for the damages caused and done to

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the boat by allowing that part of the bridge which was upon her to remain, if that was the fact, thus permitting the boat to sink, and by not caring for her, suffering her to be carried down the river? These two propositions will be separately considered, so far as it may be necessary so to do, to understand and intelligently discuss the questions raised upon the motion for a new trial.

The evidence was very conflicting as to the circumstances under which the defendant's men went to work to remove the boat, and also as to every after-occurring event. The general effect of the evidence, given by the plaintiffs was, that in the early morning, without any permission from the plaintiffs and against their will, the agents and workmen of the defendant went upon the boat and took possession of her, and then, instead of piling a weight upon her so as to sink her sufficient to pass the bridge, as might readily have been done, or by means of tugs breaking up the ice above her and pulling her up stream, as might also have been performed, they attached to her three boats and recklessly and needlessly pulled her under the bridge, thereby causing a part of the span thereof to fall upon the boat doing her great injury. The general drift of the defendant's evidence was to the effect that after the boat had rested against the bridge for several hours, and the plaintiffs had done nothing to relieve her, that its workmen undertook the removal at the request of the plaintiffs, which, though done with all skill and care, the events occurred as have been hereinbefore stated. The court charged the jury that if the defendant's servants undertook to remove and did remove the boat at the request or by the permission of the plaintiffs, there could be no recovery because the men became, for that act, the servants of the plaintiffs. If, however, there was no such request or permission by the plaintiffs, the law, to govern the action of the jury, was thus charged: "The boat of the plaintiff's being against the bridge of the defendant, it was the duty of the plaintiff, without unnecessary delay, to remove her. The boat was there without any fault

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of the defendant, and it may or may not have been there, without any fault of the plaintiffs. But, at all events, she was there resting upon and against defendant's property, and it was the duty of the plaintiffs to remove her from that position, as soon as they could, using all reasonable expedition and haste, consistent with the circumstances of the occasion. If the plaintiffs failed in the discharge of this duty, then defendant had a right to do it. In so removing the boat the defendant was bound to use ordinary care, such care as an ordinarily prudent man would exercise in the management of his own property. The defendant is not to be liable for mere errors of judgment, upon the part of its servants, but only for such acts, or such negligence, as the ordinarily prudent man would not have committed in regard to his own property. The defendant was not an insurer of the plaintiffs against all damage which might be caused in removing the boat. It was, however, required to use just so much care as the ordinarily prudent person would use, under such circumstances, in dealing with his own property. It had no right to recklessly destroy the boat, but was bound to deal with it, as the ordinarily prudent man would do, when desiring to save his own property. It may have made mistakes, but, for mere errors in judgment, the defendant is not responsible. It must be such conduct, if defendant is to be made liable, as you can say was needless, reckless or useless, and which an ordinarily prudent man would not have been guilty of under the same circumstances." The counsel for the defendant also asked the court to charge, "That the plaintiff cannot recover in this action if their boat came in contact with the bridge through their negligence in the equipment, manning or management of their boat." The court refused so to charge, and said: "I put it upon the same ground whether the boat got there by their fault or not." To the charges as made, and to the refusal to charge, and also to the remarks of the court in refusing to charge as requested, there were separate exceptions on the part of the defendant, and

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this presents the first ground upon which the motion for a new trial is based.

The question argued, and which the exception presents, is this: Assuming that the boat was in collision and contact with the bridge by the fault of the plaintiffs, is the act of the plaintiffs, which put her there, or the neglect to remove her therefrom, to be deemed contributory negligence on their part, and, therefore, one which will defeat a recovery? Reflection has satisfied me that this question must be answered in the negative. The act and conduct of the plaintiffs did not contribute to the injury in any way. The force which did the injury was an entirely independent one, and intended to be applied. It may be true that I am careless in permitting my horse to be at large, and that if it wanders upon my neighbor's premises he may recover for the trespass. If, however, my neighbor shoots him, and recklessly and willfully drives him to, and through a place, where he must be, and is, injured, it is not seen how my original careless act, in permitting him to be at large, or suffering him to commit a trespass, can be said to be contributory to that by which the animal was wounded or killed. The most that can be said is, I have permitted and allowed the horse to go and remain in a position and place, where the improper and wrongful subsequent act could be, and was done, but my act does not contribute to his. It is clear that my neighbor has a right to remove it from his premises, but it is also equally clear, as it seems to me, that he cannot do it in such a wild and reckless manner as an ordinarily prudent man would not have exhibited towards his own property. He is not to be liable for mistakes or errors of judgment, but he must not do any act which the ordinary mind would say was improper, imprudent and reckless. This was charged, and if we are told that this was indefinite, because it left so much to the judgment of the jury, it is answered that we do not see how it could have been more explicit without trenching upon their prerogative. In *Hicks agt. Dorn* (42 N. Y., 47), which was an action for destroying a boat grounded

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in the Erie canal, on page 52, EARL, Ch. J., said: "If the referee had found that this boat was a nuisance, the defendant would not necessarily have been justified in destroying it. In removing or abating nuisances, no unnecessary damage or injury to property can be justified." Precisely this line of thought influenced the charge. It was not then seen, nor is it now seen, how a wrong committed by the plaintiffs upon the defendant, could justify a second and independent one by the latter to the former. The injury done by the latter is the result entirely of a separate act of its own, and in the doing of which the plaintiffs were in no wise contributors. In *Norris agt. Litchfield* (25 *New Hampshire*, 271), it was held: "The fact that a plaintiff is a trespasser, or violator of the law, does not of itself discharge another from the observance of due and proper care towards him, neither will it necessarily preclude him from a recovery against a party guilty of negligence." A similar principle was also held in *Lovett agt. Salem and South Danvers Railroad Company* (9 *Allen*, 557), a Massachusetts case, and we regard it as sound. There is a line of cases which holds that a party who has negligently put himself or property in a dangerous position, cannot recover against another who carelessly, and not intentionally, comes in collision with him or it; and also another in which, though I am negligent in leaving something dangerous to others in an exposed place, yet a party negligently coming in contact therewith has no remedy. These are plainly cases of concurring negligence. No element of design or intent enters into either. But the doctrine which controls the cases referred to, cannot be applicable to one like this in which the act done was willful or intended—willful or intended as a simple act, without intending all the consequences. Every force and means employed to remove the boat were the results of design and not of accident. If, therefore, though all the consequences may not have been intended, what was done was wild and reckless, and intended, and such as no ordinarily prudent man would have committed, the defendant must be accountable

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therefor, because the acts are certainly its own and to them the plaintiffs do not contribute. To hold otherwise is to decide that when one finds another's property upon his premises, he can do with it whatever he pleases, a doctrine unwarranted in any sound code of morals or of law.

The defendant also asked the court to charge the jury, "that plaintiffs' boat having drifted upon, and become entangled with, a span of the bridge without any fault of defendant, defendant was not bound to the exercise of any greater skill in removing the boat and relieving the bridge than defendant's agents and employes possessed." To this the court said: "The defendant was bound to have ordinarily prudent men to do the work. While it may be true, as a general proposition, that the defendant is not responsible for mistakes in judgment on the part of its men, or the exercise of more knowledge than they have, yet it ought to have men who had knowledge sufficient to act in an ordinarily prudent manner."

The defendant's counsel excepted to the modification of this request.

It further asked the court to charge, "That the evidence being undisputed that the acts of the defendant by its servants and agents, in removing the boat, were performed in good faith, and that the method adopted by them for that object was in their opinion and belief, and to the extent of their skill, a proper one, the defendant is not liable to the plaintiff for the consequences, even though a better method might have been used." The court said: "I have charged that in part and not in part, I think it is partly true and partly not true. I think I will not charge further upon that point than I have charged. I think the company is not responsible for errors or mistakes in judgment of its employes. I think, however, the company was bound to have men in its employ of ordinary knowledge and ordinary capacity for such an emergency, and if they acted as men would not have acted

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possessing ordinary prudence and knowledge, or for mere willfulness, defendant is responsible.”

Defendant's counsel excepted to such refusal and to the modification of this request.

The question which these requests and refusals to charge involve is somewhat difficult. It certainly was not the intention of the charge to instruct the jury that the defendant was bound to have skillful men and all needed appliances requisite to remove in a proper manner from its bridge any vessel improperly placed against it, and it does not go that length. The jury had been charged that the defendant was not responsible for errors or mistakes in judgment of its men, and that it was only liable for ordinary care. The request to charge goes farther, and would have exonerated the defendant, if made, though it had willfully kept in their employ men entirely reckless, and not having the understanding of an ordinary human being. The bridge spanned a stream which was navigable, and which is one of the great commercial arteries of the nation. Necessarily, in the use of the river, crafts must come in contact with the structure of the defendant; sometimes with and by the fault of the owners, and sometimes in spite of all due care and caution. To the owners of vessels coming thus in contact with the bridge, and with the navigation of which the defendant interferes, does it owe no duty? Can it employ crazy men, who will sink and destroy every floating thing which strikes the bridge? May it keep drunken men there, or savages who will do any wild or reckless act? Of course, no sort of opinion is given that any such men were in the employ of the defendant. The supposed cases are put to illustrate the reasoning which refused the request to charge. It was assumed that the defendant owed some duty to those who might even trespass upon their property. The farmer may not keep a savage dog, which will bite and tear any man or animal which may stray upon his premises, nor a drunken or crazy servant who will destroy his neighbor's property when he finds it upon

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his employer's premises. He is limited to the employment of the ordinary means, and the ordinary persons to protect his interest. To this same accountability and no greater was the defendant held. It surely was not harsh, unreasonable, or improper to require it to have in its employ men of ordinary sense, and such as an ordinarily prudent person would have. It was not required to have skilled workmen, and the best appliances, but it was said that its employes should be such that the outside world might safely come in contact with them. If this is not sound, then the varied and divers pursuits of the business world could not be carried on in safety, for they can only be so conducted, when men with whom property and individuals must come in contact possess ordinary intelligence and are ordinarily careful. To this extent the charge went, and it seems to me now to be sound. In the complaint the act done was charged to have been improperly and recklessly done by the defendant. If it was so done, because its servants knew no better or because they were naturally wild and reckless, those facts simply bore upon the main allegation of the complaint, and did not present to the jury an issue unpresented by the pleadings. Neither was any question upon the sufficiency of the pleading raised but only the abstract one of the duty of the defendant in the employment of servants and agents.

The alleged errors in the submission of the first part of the plaintiff's case have now been examined and considered, as is hoped, without any pride of opinion controlling us, and we feel compelled to say that we have discovered none. This brings us to the submission of the after-occurring events to the jury.

It was claimed on the part of the plaintiffs, that after the boat had been pulled under the bridge and a part of the span of the latter had fallen upon her, the servants of the defendant then abandoned the boat and did not remove the timbers of the bridge which had fallen and rested upon her but permitted them to remain and by means thereof, and of such

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abandonment, the boat was sunk and swept by the current to the lower part of the city where she remained sunken for several weeks before she could be raised, and thus the machinery and engine were rusted and injured, and great damage done to the boat generally. The defendant, on the other hand, insisted that as soon as the bridge fell upon the boat its men removed it, took the boat to the dock, where she was fastened by a line and taken possession of by plaintiffs. On this part of the case the evidence was also very conflicting, utterly and wholly irreconcilable, and upon it the jury were instructed: "It was the duty of plaintiffs to relieve the boat if they could. If they did not, because they would not, then the defendant is not responsible for the subsequently accruing damages, but if they did not because they could not, and defendant could, then your next inquiry will be, is it true that defendant's men left the boat with the bridge upon her thus leaving her to sink?" The error complained of in this part of the charge is, that there was absolutely no evidence to warrant the jury in finding that the plaintiffs could not have relieved the boat, and hence the court erred in submitting that question to them.

It was not claimed upon the trial, and is now hardly claimed by the counsel for the plaintiffs, that the conduct of the defendant, in any view of the case, had been such toward the boat as to justify the plaintiffs in its abandonment. If plaintiffs had so been advised, they would not have raised the boat at all, but left it to its fate, and sought to make the defendant liable for its whole value. It is possible that I may do my neighbor's property an injury, but it cannot be said I thereby make myself liable for the entire article. If my neighbor's property is, by his fault, upon my land, and he leaves it there unreasonably, and the use and enjoyment of my own premises depend upon its removal, and I take the property, not to hold but to remove it, as its owner should have done, though it is done recklessly and carelessly, yet, it would not be seriously argued that I have thus appropriated it to my own use, and am answerable for its whole value.

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The supposed case is the one before us. Grant that the conduct of the defendant was negligent and reckless, still, what it did was done to remove the property of the plaintiffs, which was injuring that of defendant, and which the plaintiffs should have taken away, and not to convert it to its own use. No railroad train could pass the bridge whilst the boat was resting against it, and the continual pressure of the ice against the boat adding to the injury done by the first contact. The removal of the boat having been accomplished, it was clearly the duty of the plaintiffs to have taken possession of the boat as she was, and they had no right to abandon her. Why, then, was not the boat relieved from the weight upon it, and taken care of by the plaintiffs? Was it because no help could be procured? There really was no pretense of that sort upon the trial. Mr. Mark, one of the plaintiffs, and their general manager, saw, as he swore, the boat gradually sinking from the weight of the bridge material upon her, and did nothing. Why? The answer he gave, himself, as taken down upon my own minutes, was: "I could have got tugs and help, but as I had not pulled the bridge on her, I did not think I had any business to take care of it." There was absolutely no evidence which could have justified the jury in finding that the plaintiffs could not have relieved the boat, and it was, therefore, clearly erroneous to submit to them any such question (*Storey agt. Brennan*, 15 *N. Y.*, 524). It is no answer to this difficulty to say that the boat was there sunk and that all damages had been done which were done. This, at least, was a disputed question, and the weight of the evidence and of all probabilities are against it. Upon the undisputed facts the jury should have been instructed that the plaintiffs could only recover, if at all, for the injury and damage done to the boat by her removal and the fall of the bridge upon her. That for all injuries which occurred after the plaintiffs could have relieved her, there could be no recovery. From the amount of the verdict, and its form, which indicated that the jury had allowed a counter-claim to

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the defendant for the injury done to the bridge by the boat striking against it, it is apparent that the plaintiffs have had a full recovery for all the injuries sustained. As a part of their injuries, judging from the proof, were avoidable, and caused by plaintiffs' neglect, there must be a new trial. There was no evidence which would justify any jury in finding that the plaintiffs were powerless to save their property; on the contrary, one of such plaintiffs gave affirmative and positive testimony that the boat was abandoned because he thought he had no business to take care of her.

As the conclusion has been reached that there must be a new trial, for the reason indicated, the alleged irregularity in sending the jury back to their room to calculate the interest after their verdict had been delivered to the clerk, which the form of such verdict showed they intended to add thereto, will not be formally discussed; suffice it to say, that as the jury had, as we have said, found that they intended to allow interest, it could not have been irregular to instruct them to calculate its amount. There was no error in this respect, but for the one which we have considered, and which was the submission to the jury of an issue, upon which there was no conflicting testimony, there must be a new trial, with costs to abide event.

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SUPREME COURT.

THE PEOPLE, &c., agt. THE ERIE RAILWAY COMPANY.

THE FARMERS' LOAN AND TRUST COMPANY agt. THE SAME.

J. C. BANCROFT DAVIS agt. THE SAME.

Mortgage foreclosure — who may apply to be made a party — judgment creditor — Creditor at large.

A creditor at large has no *status* in a court of equity.

Where a person seeking to be made a party to an equitable action against a corporation, has not proven his debt by obtaining a judgment, he cannot be regarded as a creditor, and is not entitled to the relief asked for, and neither the insignificance nor the magnitude of his claim can alter the principle governing such cases.

The court will not allow the petitioner to intervene upon affidavits alone, and to stay the sale under a decree of foreclosure, which on its face is regular and legal, and more especially where it appears from the papers that the plaintiff as a co-plaintiff with others, has a suit then pending in which the validity of all the proceedings in the foreclosure suit is questioned.

Special Term, April, 1878.

MOTION by petitioner that he be made a party to each of the above-entitled actions and that he may be allowed for himself and all others similarly situated with him to come in and defend. The petitioner alleges in his affidavits that he is a creditor of the defendant, the Erie Railway Company, which is not only flatly denied, but it is averred that the petitioner is actually indebted to the defendants in a large amount.

Gray & Davenport, for petitioner.

Turner, Lee & McClure, for Farmers' Loan and Trust Co

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LAWRENCE, J. — I have examined the vast mass of papers referred to and submitted on the argument of this motion, and after giving to the facts disclosed and to the arguments presented the most careful consideration, I have reached the conclusion that the motion should be denied.

The petitioner has not established, to my satisfaction, that he has the first lien, which he claims, either upon the Western Extension Certificates, or upon the stock of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company.

The allegations contained in the petition in respect to the alleged liens are most fully met and denied by the answering affidavits, and the allegation that the petitioner is a creditor of the defendant to the amount stated in the petition is not only flatly denied, but it is averred that the petitioner is actually indebted to the defendants in the sum of about \$2,000,000. Taking the most favorable view of the case for the petitioner, on the papers presented, he can only be said to have established that he claims to be a creditor at large of the defendant. As such creditor he has no status in a court of equity (*Dunleavy* agt. *Tallmadge*, 32 N. Y., 457; *McCartney* agt. *Bostwick*, 32 N. Y., 53; *McDermott* agt. *Strong*, 4 John. Ch., 687; *Reuben* agt. *Joel*, 3 Kernan, 488; *Crippen* agt. *Hudson*, 3 Kernan, 161; *Becks* agt. *Burdett*, 7 Paige, 305).

The case of *The Railroad Company* agt. *Howard* (7 Wall. Rep., p. 392) was an action by creditors who had recovered judgments against the company and had issued executions thereon which had been returned *nulla bona* (See p., 397).

The case does not, therefore, avail the petitioner. So in the case of *Schenck* agt. *Ingraham* (5 Hun Rep., p. 397) the petitioners had recovered judgment and an execution thereon had been returned unsatisfied.

If the case of *Dambman* agt. *The Empire Mill and others* is to be construed as maintaining an adverse position to that just stated, it is in conflict with numerous decisions of the court of appeals of this state and the latter decisions must control me in the disposition of this motion. Furthermore,

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if the plaintiff has the first or specific lien which he claims, as he is not a party to the foreclosure suit, no rights which he may possess can be affected by the judgment in that action. The suggestion was made upon the argument that as Mr. Mc Henry's claim was a large one he has an exceptional interest in protecting what is denominated as the general creditor's fund. I do not concede the force of this argument. If the petitioner has not proven his debt by obtaining a judgment, he cannot be regarded in equity as a creditor and neither the insignificance nor the magnitude of his claim can alter the principle governing the case.

There is another consideration which may be properly entertained in disposing of this motion.

It appears from the papers before me that the plaintiff as a coplaintiff with others has a suit now pending in which the validity of all the proceedings in the foreclosure suit brought by the Farmers' Loan and Trust Company is questioned. This includes of course the decree. The plaintiff will have an ample opportunity to establish in that suit the invalidity of the decree of foreclosure, and if the irregularities exist which he alleges he can be relieved after evidence shall have been received in the usual formal manner incident to a trial, of a cause upon the merits.

Here I am asked to allow the petitioner to intervene upon affidavits alone and to stay the sale under a decree which on its face is regular and legal. I regard the petitioner on the papers before me as having failed to establish such a standing in court as authorizes him to intervene in the above-entitled actions, and his motion must, therefore, be denied with costs.

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SURROGATE'S COURT, DELAWARE COUNTY.

In the Matter of the probate of the last will and testament
of WILLIAM SIMPSON, deceased.

Will—lost or destroyed codicil—Surrogate's power as to—effect of destruction of codicil as to revival of will—effect of acts and declarations of testator at time of such destruction—Parol republication.

S. made his will in 1871, disposing of his entire estate; in 1872 he executed a codicil making a different disposition of personalty to the amount of \$50,000; in 1876 he burned the codicil with the intention of revoking it; he then held the will of 1871 in his hand and declared in the presence of two witnesses: "This is my last will and testament, I shall never make another;" wrote a direction to his executors referring to the will as his last will, inclosed it and the will in an envelope and wrote upon it: "The last will of William Simpson, dated August 18, 1871;" sealed the envelope so that it could not be opened without detection, and carefully preserved it among his valuable papers until his death. Upon proceedings being taken by the next of kin within one year after its probate to contest its validity and the competency of its proofs. *Held:*

- (1.) That in proceedings to prove a will the surrogate has power to inquire whether a subsequent testamentary instrument has not been executed revoking the will propounded, even though such subsequent will may have been lost or destroyed.

Such power is necessarily implied in the jurisdiction given to the surrogate to determine whether the instrument submitted for probate is the last will of the testator.

- (2.) Where a codicil impliedly revokes a will in part, by reason of inconsistent provisions, the destruction of the codicil *animo revocandi*, revives the provisions of the will revoked by its execution.

Such a codicil is not a "second will" within the provisions of section 51, 3 Revised Statutes (6th ed., p. 65), which declares that the destruction of a "second will" shall not, *ipso facto*, revive a former will.

- (3.) Where a second will is revoked by destroying it, acts and declarations of the testator accompanying the destruction, evincing an intention to

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revive and give effect to a former will, are not sufficient for that purpose unless they amount to a republication of the former will.

- (4.) A parol republication of a revoked will, if made in the presence of two witnesses, is valid.

Re-execution and reattestation are not necessary.

Prior to the Revised Statutes a will of personalty in this state and in England could always be republished by parol. It was otherwise with respect to a will of lands, which, after the statute of frauds (29 Car., 2, c. 8), could not be republished except by an instrument, in writing, attested by three witnesses. Nor was any particular form of words required to constitute a good publication of any will, or a republication of a will of personalty. •

Any thing which indicated a present intention on the part of the testator that the instrument should operate as his will was sufficient.

The Revised Statutes have so far changed this rule as to require in the case of all wills a parol declaration of the testator in the presence of two witnesses that the instrument signed by him is his last will and testament and to that extent only have modified the requirements necessary to constitute a valid publication or republication of a will.

October, 1878.

L. L. Bundy and F. R. Gilbert, for proponents and Daniel Simpson, a legatee.

E. M. Morse and H. O. Cheesebro, for contestant.

I. H. MAYNARD, *Surrogate*.—This was a proceeding brought by Alma Virgil, a sister of the testator, under the statute relating to the probate of wills of personal property, to contest the validity and the probate of the will of William Simpson, deceased, late of Davenport, in this county. The main facts, upon which the principal questions arise, are these:

The testator duly executed his will August 18, 1871, giving his entire estate, valued at \$100,000 and upward, to his wife, the proponent, Emeline Simpson (who is also appointed executrix), excepting \$10,000, which he gave to his brother, Daniel Simpson. At this time the testator, then sixty-two years of age, was in feeble health, and his wife, who was six years his junior, was in good health. On the 13th day of

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April, 1872, his wife, then being seriously ill, and not expected to survive long, he duly executed a codicil to this will, in which he gave various legacies, amounting in all to about \$50,000, to his brothers and sisters, and other relatives, and to different charitable and religious purposes, and for the preparation of a burial place and the erection of a monument.

The evidence fails to establish the exact amount of each legacy excepting that there was given to his executors, in trust, the sum of \$10,000, for the erection of a church at his place of residence, and the sum of \$5,000* to provide a burial place for himself and family, and for a monument.

The codicil was drawn by James Stewart, Esq., a son of his wife's brother, a lawyer, and one of the proponents here, and an executor named in the will of 1871.

He was called as a witness by the contestant, and testified to the fact of the execution of the codicil; that he had no doubt that it was duly executed and attested, and that all the formalities required by law had been strictly complied with, but he was unable to give the names of the witnesses to it, or any definite information as to its contents further than above stated. The contestant being thus unable to ascertain the names of the witnesses to the codicil, they were not produced or examined upon the hearing of this matter.

In May, 1876, the testator's wife having recovered, and being himself in feeble health, he destroyed this codicil by putting it in the stove and burning it up in the presence of his wife and Mr. Stewart. Previously to doing so the will and codicil had both been read by Mr. Stewart at the testator's request, and then taking them both in his hand he said: "I am going to destroy this codicil and do it now," and immediately accompanied this declaration with the act of destruction. Immediately afterward he held the will of 1871 up in his hand and declared, in the presence of his wife and Mr. Stewart, "this is my last will and testament, I shall never make another," and he then wrote a request or direction to his executors to pay his brother Daniel, one year after his death,

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\$10,000, in addition to the \$10,000 "named in my last will and testament, dated and made the 18th day of August, 1871," and inclosed this direction with the will of 1871 in an envelope, sealed it, made certain marks across the seal so that it could not be broken open without detection, and wrote upon the envelope, "last will of William Simpson, dated August 18th, 1871," and caused it to be placed among his valuable papers and carefully preserved until his death. He died, December 23, 1876, without issue. This will was afterwards admitted to probate by the surrogate of Delaware county, February 27, 1877, without objection, and within one year thereafter the contestant filed allegations against its probate and then instituted this proceeding. It is conceded that the will of 1871 was properly executed; that the execution of the codicil of 1872 revoked the will by implication in so far as the provisions of the codicil were inconsistent with those of the will, and that the destruction of the codicil operated as a revocation of that instrument; and upon the facts proven the contestant insists upon the following propositions which demand consideration.

First, that the destruction and consequent revocation of the codicil, did not operate, *ipso facto*, to revive the provisions of the will which had been revoked by it.

Second, that the acts and declarations of the testator at the time of the destruction of the codicil, although evincing an intention to revive and give effect to the will of 1871, were not sufficient for that purpose; that nothing short of a written instrument executed with all the formalities required for the execution of a valid will, could be effectual to restore the provisions of the will impliedly revoked by the execution of the codicil.

Third, that the will of 1871, could not be republished by parol, and that since the adoption of the Revised Statutes, a will cannot be duly republished unless it is re-executed and reattested with all the formalities with which it was originally executed.

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I will consider these questions in the order in which they are stated ; but it first becomes necessary to dispose of a preliminary point raised by the proponents.

They insist that the surrogate has no jurisdiction to take proof of the execution of the codicil, or of its provisions, or of its destruction, on the ground that by the provisions of the Revised Statutes (*vol. 3 [6th ed.], secs. 95 - 100, pp. 71-72*) the supreme court has exclusive jurisdiction to take proof of the execution, and validity of a lost or destroyed will, and to establish the same ; and that the surrogate can take no proceedings in regard thereto, until a decree of the supreme court has been obtained establishing the lost or destroyed will.

This proposition does not seem to be tenable. Undoubtedly, when the object of the proceeding is to establish the lost or destroyed instrument as a valid testamentary disposition of the testator's property, existing at the time of his death, the surrogate has no jurisdiction to determine that question ; but under the statute the proceedings for that purpose should be taken in the supreme court. But where the issue to be determined by the surrogate, is whether a written instrument propounded for probate is the last will of the testator, it follows, of necessity, that he has jurisdiction to inquire whether a subsequent testamentary document revoking the will in question had not been executed, even though it may have been lost or destroyed.

The question, which above all others, the surrogate has exclusive jurisdiction to hear and determine, is whether the instrument propounded is the *last* will of the decedent, and he must, by implication, have jurisdiction to determine all subsidiary questions involved in it. The instrument in controversy cannot be the testator's last will, if a subsequent will has been executed revoking it wholly or in part ; and if the latter happened to be destroyed and the surrogate is precluded from inquiring as to its execution, he would be compelled to declare that to be the testator's last will which confessedly was not so.

I am supported in this view by the case of *Nelson* agt.

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McGiffert (3 Barb. Ch., 158), which holds that upon the probate of a will the surrogate has jurisdiction and power to receive proof that such will had been revoked by a subsequent will of the testator which had been destroyed. In that case the evidence, with reference to the execution of the destroyed will, was closely analogous to that in this case, but there was no proof whatever as to the contents of the destroyed will, or that it contained any provisions inconsistent with or revoking the former will. And it was, therefore, also held that the execution of the subsequent will did not of itself revoke the prior will without proof that it contained inconsistent provisions or a revoking clause.

The true rule seems to be, that where it is necessary to take proof of a destroyed subsequent will for the purpose of determining whether the instrument submitted for probate was the testator's last will, the surrogate has power to hear the evidence and determine that question, but where the object of the evidence is to establish the destroyed subsequent will as a testamentary disposition of the testator's estate valid and effectual for that purpose at the time of his death, then the surrogate is deprived of jurisdiction and resort must be had to the supreme court.

Nor do I see any difficulty under this rule of the kind suggested by proponent's counsel in entering the proper decree in such cases. If I should find in this case that as to that portion of the testator's estate disposed of by the codicil of 1872 the will of 1871 was revoked, and he so far died intestate, a decree could be entered admitting the will of 1871 to probate as a will of the testator's real and personal estate, except as to that portion of his estate disposed of by the codicil of 1872, and that as to that part of his estate and in another tribunal, necessary if, what the dispositions of the codicil were.

I am thus brought to a review of the questions raised by the contestant the first of which is, that the destruction of the codicil, *animo revocandi*, did not, of itself, revive the provisions

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of the will which had been impliedly revoked by its execution. This seems to have been tacitly conceded upon the argument by the proponent's counsel, but I am not prepared to give an unqualified assent to the soundness of the proposition. It depends upon the construction to be placed upon sections 51 (formerly 53) and 103 (formerly 71) of the Statute of Wills (6th. ed.).

Section 103 provides that "the term 'will' as used in this chapter *shall include all codicils* as well as wills." And section 51 provides that "if after making of any will the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will, shall not revive the first will, unless," &c.

The contestant's counsel claim that by force of the one hundred and third section, the term "second will" in the fifty-first section may be regarded as of equivalent import with that of a codicil to the first will, and that the section is to receive the same construction as if it read: "If after the making of any will the testator shall duly make and execute a second will *or a codicil to the first will*, the destruction, canceling or revocation of such second will or of such codicil shall not revive the first will," &c.

This does not seem to be the true construction to be placed upon these sections. The declarations in the one hundred and third section is not that the term will, shall be synonymous with that of codicil, and hence that whenever used in that chapter it could be replaced by the term codicil and the meaning preserved, but it simply provides that in the term will, shall be embraced all codicils to a will, so that wherever the word will is used it shall have the same effect as if it had been written "a will and all codicils to it" to avoid the necessity of a repetition.

It would be doing violence to the language of section fifty-one to hold that the phrase "second will" shall be construed to mean in any case simply a codicil to the first will. It evidently refers to a testamentary instrument which assumes to

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dispose of the testator's entire estate, and not to an instrument which is merely an addition or supplement to a former will; and which has no legal entity independent of the existence of the latter. This is the view taken by the reporter in a foot note to *Simmons* agt. *Simmons* (26 Barb., at page 76), where he says, referring to this very section. -

"The revisers here manifestly use the word 'will' (unqualified) as *ex vi termini*, meaning a complete disposition of the testator's whole property and therefore any second one is necessarily a revocation of any former will." If this is so then the rule of the common law is still in force in this state, which holds that the destruction of a codicil which only by implication revoked a former will in part by reason of inconsistent provisions, does, *ipso facto*, revive the revoked portions of the will (*Powell on Dev.*, 549; *Perkins*, sec. 479; 4. *Burr*, 2512; 1 *Redfield on Wills*, pp. 375-77).

And so, in the present case, the destruction, by the testator, of the codicil of 1872 would leave the will of 1871 in full force and effect to the same extent as if the codicil had never been executed.

The next question raised by the contestant is, that the acts and declarations of the testator, at the time of the destruction of the codicil, although clearly manifesting an intention to revive the will of 1871, in its original integrity, were not sufficient to accomplish that object, and that the provision in section 51, above referred to, that "the destruction, canceling, or revocation of such second will, shall not revive the first will, *unless it appears by the terms of such revocation*, that it was his intention to revive and give effect to his first will," etc., only applies to a case where the second will has been revoked by a written revocation, which also declares the testator's intention to revive the former will.

There is great force in their argument upon this point. By section 40, three methods of revoking a will are provided for; by destruction, by cancellation, and by some other writing of the testator declaring such revocation, and executed with the

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same formalities as the will itself. These methods are all evidently referred to in section 51, and if the term "revocation," as used in the first clause of this section, does not refer to a written revocation alone as contradistinguished from a revocation by destruction or cancellation, and is to be deemed to comprise every method of revocation, then the terms "destruction" and "canceling," are entirely superfluous and meaningless; and if the term as there used is to be limited to a revocation by a written instrument, it would be a violent construction to say, that when again used in the same section and in the same sentence, too, it is not to be given the same legal signification. If the revisers or the legislature intended that "revocation" when last used in this section should include a revocation by destruction or cancellation, they have been most unfortunate in the choice of language, to express such intention. The phrase "unless it appears *by the terms* of such revocations," &c., is peculiarly apt, if a revocation by a written instrument is intended, but utterly inappropriate if designed to apply to a case of revocation by destruction or cancellation.

But the most interesting and important question in this case arises upon the construction to be given to the last clause of the fifty-first section, which provides in substance for the revival of a former will, in case the testator, after the destruction of the second will "*shall duly republish his first will.*"

What, then, is necessary to constitute a valid republication of a revoked will? If the acts of the testator, and his parol declarations in the presence of witnesses, can be, in any instance, sufficient for that purpose, it is conceded that a republication was effected in this case, for it is difficult to conceive of more unequivocal acts, or more emphatic declarations evincing such an intention than those here employed. But the contestant's counsel say, that under our statute, there can be no valid republication of a revoked will by parol, or by any acts of the testator, short of a re-execution of the will with all the formalities, with which it was originally executed.

And I am unable to find any reported adjudication upon

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this question in this state, since the adoption of the Revised Statutes. Its importance will justify a somewhat extended examination of it.

And first, what is meant by the publication of a will? Evidently it is but one of the four acts, prescribed by section 38, of the Statute of Wills and is defined in the third subdivision of that section, as follows: "The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament."

Bouvier, in his Law Dictionary, says that when spoken of a will: "It signifies that the testator has done some act, from which it can be concluded that he intended the instrument to operate as his will."

The supreme court, in *Lewis* agt. *Lewis* (13 Barb., at p. 24), define publication to be the declaration by the testator, at the time of signing, or acknowledging his signature, that the instrument is his will; and the same court in *Butler* agt. *Benson* (1 Barb., 529), held that four things are requisite to the due execution of a will and among them, "publication or declaring to them (*i. e.*, the witnesses), at the time of making or acknowledging subscription, that it is his last will and testament." In *Nipper* agt. *Groesbeck* (16 Barb., 670), BACON, J., says that the third requisition of the statute requires "what is technically known as the publication of the will." To the same effect is *Torry* agt. *Brown* (15 Barb., 3051), *Burrett* agt. *Silliman* (16 *id.*, 198), *Sequine* agt. *Sequine* (2 *id.*, 393), *Lewis* agt. *Lewis* (11 N. Y., 220⁹).

Our statute of wills is peculiar in this respect; the English statute, and that of many of the United States, not requiring, any publication, as a distinct act in the execution of a will (1 *Redf.*, pp. 213-217). The thirteenth section of the present English Statute (1 *Vict.*, ch. 26), expressly provides, that publication shall be unnecessary; and it has been doubted whether, as to a will of real estate, publication, in the sense required by the statute of this state, was ever necessary since

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the enactment of 29th Chas. 2, chap. 3 (*See opinion of the chancellor, in Brinkerhoff agt. Remsen, 8 Paige, 488*). As most of the cases there, involving the question of the proper execution of testamentary instruments, have arisen in regard to wills of real estate, this fact will probably explain why the later English reports are so barren of authorities upon this subject.

It will thus be seen that publication itself is merely a parol declaration, on the part of the testator, making known, or declaring, in a public manner, the testamentary character of the instrument, which he has already signed in the presence of the witnesses.

Considering the nature of the original act of publication, there would seem to be no good reason for holding that a republication cannot be effected in the same manner. It is simply a second publication, or publication anew of the instrument.

Bouvier defines it to be "an act done by the testator, from which it can be concluded that he intended that an instrument which had been revoked by him, should operate as his will."

The English Statute of 1 Vict. (chap. 26, sec. 32) provides that no revoked will shall be revived, otherwise than by the "re-execution" thereof, and the thirty-fourth section, limiting the operation of the act to wills executed after January 1, 1838, provides that every will "re-executed, republished, or revived," shall, for the purpose of the act, be deemed to have been made at the time it was so re-executed, *republished*, or revived; and the author of *Hayes and Jarman on Wills*, in a foot note to this section, at page 58, says: "The word *republished* seems to have crept in by mistake. The section contemplates the re-execution of a will, after the act has come into operation; such re-execution must be performed with the formalities required by section 9. If these be complied with *publication is unnecessary*, if not, it is of no avail." Clearly recognizing that republication and re-execution are not synonymous, or convertible terms. Much confusion upon the sub-

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ject has arisen from the fact that in some of the United States, and other countries, there are statutes expressly providing the manner in which a republication shall be made, but our statute is entirely silent, as to the requirements necessary to constitute a valid republication. The term "republish," is nowhere used in the statute, except in the section referred to, nor is the word "publish," or "publication," or "republication," any where employed. The statute, therefore, gives us no light as to the sense in which this term is to be construed. The revisers and the legislature seem to have used the word, as if it had already a well understood and well defined legal signification. They seem to have regarded its construction, as well settled by a long course of judicial decision, and whatever that construction is found to be, must be deemed to be the meaning of the statute, except so far as it may have been modified by the statutory requirements, in regard to publication. An examination of the cases upon this subject has satisfied me that in England, prior to the act of parliament of 1 Vict., c. 26, a parol republication of a revoked will of personal property, was sufficient to revive the will. It was different with respect to a devise of real estate, for the statute of frauds intervened, and declared that every devise of land should be void that was not in writing and signed by the testator and attested by at least three subscribing witnesses (29 Car., 2 c. 3); but the rule in regard to wills of personal property, remained unchanged, until the passage of the wills act of 1 Vict. (1 Redf., pp. 367, 368). By keeping in view this distinction between devises of real estate, and wills of personal property, much confusion will be avoided, and the authorities upon the subject found to be nearly harmonious.

The earliest reported English case I am able to find is that of *Hull* agt. *Dench* (1 *Vernon*, 330), decided in chancery, 1685. There was there an implied revocation growing out of the execution by the testator, after making his will, of a mortgage in fee of lands devised in the will, After the execution of the mortgage the testator declared in the presence of sev-

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eral witnesses that his former will should stand, and the master of the rolls thought that was a new publication of the will, though it was objected that such parol declarations, since the statute of frauds and perjuries, would not amount to a new publication and it was also there held that republication of a will was favored in equity and slight evidence would be enough to establish it. The will was made in 1663, before the statute of frauds, and the testator died in 1683, after its enactment; and it does not appear when the new publication occurred.

Then came the case of *Alford* agt. *Earles*, in the same court, 1690, when the question arose as to the effect of a codicil to republish a will, and the case of *Cotton* agt. *Cotton* was cited, tried in the common pleas before lord chief justice NORTH, where the testator saying his will was in a box in his study, amounted to a new publication. And the editor in a foot note (1st Am. ed.) refers to *Anon.* (2 *Shaw*, 48), where it was held by all the court, that the words "my will in the hands of J. S. shall stand" amounted to a good republication, if attended by circumstances demonstrating *animus republi-candi* in the testator; but doubts their effect in the case of a will of lands, since the statute of frauds, as there can be no republication of such a will by implication, but the will must be re-executed, otherwise a devise of lands will not be good, and cites PARKER, chief justice, in *Ackerly* agt. *Vernon* (*Com. Rep.*, 381) and *Martin* agt. *Savage* (Nov. 22, 1740 [not reported]). In *Lytton* agt. *Lady Faulkland* (2 *Eq. Ca. Ab.*, 768), decided in 1708, the effect of the execution of a codicil disposing only of personalty, was considered and it was decreed not to be a republication of the will so as to pass after-acquired lands, because, since the statute of frauds, there could be no devise of lands by an implied republication, as the paper in which a devise of lands is contained ought to be re-executed in the presence of three witnesses. But in *Ackerly* agt. *Vernon*, reported in the same volume, it was held the other way and that there might be a republication without

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re-execution and hence by implication, and the latter case seems to have been followed in all the subsequent cases as the better authority.

In *Ambler agt. Miller* (2 *Atkin*, at page 599) the question arose, in 1743, in regard to a bequest of personalty. There the testator was looking among his papers for another instrument with a person who was assisting him in making the search, and the latter having taken up his will by mistake the testator said to him, "that is my will" and the lord chancellor (HARDWICKE) held it was not a good republication for the reason that he made the remark "not meaning to republish but only to show that it was not the paper he wanted. To make it a republication there must be *animus republicandi* in the testator."

In the case of *Barnes agt. Crowe* (1 *Vesey, Jr.*, 486), decided in 1792, the question received a very exhaustive review, both in the argument of counsel and the opinions of the court. It involved the point whether the execution of a codicil disposing of personal property alone, but attested by three witnesses, was there declared to be that "to republish a will re-execution is not necessary, nor a particular intent to republish; intent to consider it as of a subsequent date is sufficient, which intent, *in case of land*, must, since the statute of frauds, appear in writing according to the provisions of the statute."

There are many other English cases holding substantially the same doctrine (*The Attorney-General agt. Downing, Amb.*, 571; *Jackson agt. Harlock, id.*, 487; *Potter agt. Potter*, 1 *Ves.*, *Sen.*, 437; *Gibson agt. Lord Montford, id.*, 485; *Carlton agt. Griffin*, 1 *Burr.*, 549; *Lopping agt. Fernyhough*, 2 *Broc. C.*, 291); and such remained the settled law of England until the passage of 1 *Vict. c. 26*, the twenty-second section of which expressly provides that no will or codicil or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof. It also became the law of New York upon its organization as a state,

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and not having been changed by statutory enactment, was the law at the time of the adoption of the Revised Statutes.

Neither the revisers or the legislature have assumed to change it, and they use the word "republished" as if it were one of familiar legal import, needing no definition or explanation to illustrate its meaning.

The only reported case in this state upon the question of parol republication is that of *Jackson* agt. *Potter* (9 *John.*, 312), which was decided in 1812, and was a case where subsequently to the making of the will the testator acquired other lands, which, as the law then was, would not pass by the will, and it was sought to prove a parol republication in order to pass the after-acquired lands; and it was held that a parol republication was not sufficient for that purpose.

The court, in a very brief *per curiam* opinion, say: "It is equally well settled, that the republication of the will *so as to affect the after-acquired lands* must be made with like solemnity as the execution of the original will," which is not in conflict, but in harmony with the views here expressed. I have not overlooked the case of *Simmons* agt. *Simmons* (26 *Barb.*, 76), in which judge GOULD, after citing the fifty-first (then the forty-sixth) section of the statute says "Here, by legislative and simultaneous construction, a second will duly made and executed (without any clause declaring the former one revoked) is shown to have put the first so utterly out of vital existence that it either needs republication (tantamount to an entirely new execution) or an express revivor by the terms of the writing revoking the second will." Here the learned judge declares that under this section a republication is tantamount to an entirely new execution. It is not clear what was intended by this expression. If it means simply that the legal operation of a republication was to impart to the will the same force and effect as if it had been executed anew, then there is in it nothing opposed to the views here expressed; but if it means that in order to constitute a valid republication there must be an entirely new execution of the

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will. This might be true so far as the instrument was a will of real estate, but as to wills of personalty it is at the best but a mere *dictum*, as there was no question involved in the case calling for a construction of that section in this respect. And the reporter in a foot note calls attention to the fact that the corresponding section of the English statute speaks of a *devise* and not necessarily of a *will*.

The Pennsylvania reports abound in cases involving the question of parol republication, and while their statute of wills differs from ours in many essential respects, yet they follow the English rule, and hold that parol republication is good, unless prohibited by express statutory enactment, and thus they are authority for the position taken here (*Howard* agt. *Davis*, 2 *Bina.*, 4191; *Jones* agt. *Hartley*, 2 *Whart.*, 103; *Campbell* agt. *Jamison*, 8 *Penn. St.*, 498; *Musser* agt. *Curry*, 3 *Wash. C. C.*, 481; *Flinthame* agt. *Bradford*, 10 *Penn. St.*, 82; *Jack* agt. *Shoenberger*, 10 *Harris*, 416; *In Franssen's Will*, 26 *Penn. St.*, 207; *Gable's Err.* agt. *Daub*, 40 *Penn. St.*, 217).

Jack agt. *Shoenberger* (*supra*) was twice before the supreme court of that state. It was ejectment for after-acquired lands; the plaintiff claiming as heir, and the defendant under an alleged parol republication of a will. Upon the first trial in the common pleas, evidence of the parol republication was admitted, and the defendant had a verdict. Upon error to the supreme court, a new trial was ordered on the ground that evidence of a parol republication was inadmissible; chief justice GIBSON, writing the opinion, and of the other judges, two concurring, and two dissenting. The second trial resulted in a verdict for the plaintiff, evidence of the parol republication having been excluded; and upon error again to the supreme court, a new trial was again granted, and the former decision of that court overruled, and the evidence held to be competent, and admissible, WOODWARD, J., delivering the opinion and all the other judges concurring.

In *Gables' Err.* agt. *Daub* (*supra*), the same court, READ,

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J., says: "So, prior to the statute of frauds, a *will of lands* might have been republished by parol, and would have all the effect of an original will from the time of its republication, and would pass lands purchased by the testator, between the first execution, and the republication; and such, also, was the law of this state." Much stress is laid by the contestant's counsel upon the reviser's notes to section 51, as manifesting an intention on their part to exclude evidence of a parol republication.

I do not so understand their language. They say, in substance, that the question is in doubt as to the effect of the revocation of a subsequent will in setting up a prior one; that in the common law courts, the presumption is in favor of a revival; while in the ecclesiastical courts it is the other way or else no presumption is indulged in at all, and that in both courts it is undisputed that parol evidence is admissible to ascertain the real intentions of the testator and to determine the fact of a revival of his will, or a designed intestacy. They then declare "it is this rule which the revisers propose to change, by adopting a presumption against a revival, and excluding evidence to contradict it;" but there is nowhere an intimation, even, that they propose to change the rule in regard to a parol republication, or to provide that republication could not be effected by any thing less than a re-execution of the will.

They did change the rule as to a publication, by explicitly defining the form of words necessary to constitute that act, and perhaps to that extent, modified the rule in regard to a republication.

Hitherto no particular acts or words were required to amount to a publication. It was enough, if it appeared from the facts and circumstances attending its execution, that the testator intended that the instrument should operate as his will. So in one case where the will was in his handwriting, but nothing was said by him at the time it was signed and attested indicating its testamentary character, it was held to be a sufficient publication (*Peate agt. Ongley, Comyns Rep.*, 197).

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And in another case it affirmatively appeared that the testator deceived the subscribing witnesses, by informing them that it was a deed and not a will, yet it appearing from other evidence, that the testator knew the nature of the instrument, and intended it as his will it was determined to be a good publication (*Trimmer* agt. *Trimmer*, in 4 *Burns' Eccl. Law*, 130).

The Revised Statutes, in order to remove all doubt and uncertainty upon the subject, require, as one of the distinct acts in the execution of a will, that the testator shall declare, in the presence of two witnesses, that the instrument is his last will and testament, and in that respect have infringed upon the old rule in regard to publication, and to that extent they have, perhaps, changed the requirements necessary to a republication, but no further.

The result of this review of the question may be briefly stated as follows:

Prior to the statute of frauds (29 *Car.*, 2) all wills might be republished by parol; subsequently to that enactment, wills of real estate could be republished only by a re-execution thereof, but wills of personalty, could still be republished by parol until the passage of the act of 1 *Victoria*, and no particular form of words was necessary, either to a valid publication or republication; any thing which indicated a present intention that the instrument should take effect as his will sufficed; such was the law of this state at the time of the adoption of the Revised Statutes, which have changed it only so far as to require a parol declaration, on the part of the testator, in the presence of two witnesses, that the instrument is his last will and testament.

In this case the rule was fully complied with. It is conceded that the testator, immediately after the destruction of the codicil, deliberately and with the express intention of republishing the will of 1871, declared, in the presence of two witnesses in the most solemn and emphatic manner, that the instrument was his last will and testament. No objec-

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tion is made to the competency of the witnesses. They were in fact called by the contestant and the evidence upon this subject drawn out upon her examination.

I am the more readily constrained to this conclusion, because the intention of the testator that the will of 1871 should be revived according to its original terms and provisions is so clear and unmistakable.

The courts of this state have repeatedly held that the principal object of our statute of wills was, not to obstruct the citizen in the exercise of his right to dispose of his property by will, but to secure him in the enjoyment of that right and hence, in furtherance of this object, they have frequently sacrificed the strict letter of the law for its more beneficent spirit (*Hoyradt* agt. *Kingman*, 22 N. Y., 372; *Coffin* agt. *Coffin*, 23 N. Y., 9; *Gamble* agt. *Gamble*, 39 Barb., 373).

The true rule of construction of the statute is well stated by DENIO, J., in *Hoyradt* agt. *Kingman* (*supra*, at p. 379). "The general right to dispose of one's property by act in writing, to take effect at his death, is established by our statute respecting wills and has always been the law of this state. The restrictions, which from motives of prudence are thrown around that right, should be construed liberally in favor of the testament, *and forms should not be required which the legislature has not plainly prescribed.*"

It follows, if these views are sound, that whatever may have been the effect of the execution and subsequent destruction of the codicil of 1872 that the will of William Simpson, dated August 18, 1871, having been republished after the destruction of the codicil was his last will and testament, and as such was properly admitted to probate by my predecessor, and such probate should be confirmed.

Costs should not be allowed to either party as against the other or out of the estate.

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N. Y. COMMON PLEAS.

ELLA M. LYNCH, plaintiff and appellant, agt. CHARLES A.
ST. JOHN, defendant and respondent.

Interpleader in replevin — Property clerk custodia legis — Appeal.

In an action of claim and delivery the third subdivision of section 122 of the Code, giving the court discretion to substitute for the defendant in the action, a party who makes a claim against the defendant for the property, is necessarily to be interpreted in connection with the two hundred and sixteenth section, which provides that if the property taken in an action of claim and delivery be claimed by any other person than the defendant such person shall make an affidavit of his title to the property, and the right to the possession of it, stating the ground of such right and title and serve the same upon the sheriff; after which, by the provisions of the section, it is made incumbent upon the plaintiff to indemnify the sheriff against such claim by the undertaking therein provided for.

The property clerk of the New York Municipal Police Department has no right to retain property from its rightful owner after the prosecution which gave rise to his possession has ceased; and in case of replevin proceedings he must, like any other public officer, obey the lawful order and process of the court. He cannot make a conditional compliance. If, however, there be any reason why the property, for public purposes, should remain in the possession of the property clerk, his course is to apply to the court to control its own process.

An order directing an interpleader is appealable.

General Term, December, 1878.

THE defendant, who is the property clerk of the Municipal police of the city of New York, was sued in proceedings of claim and delivery to recover possession of certain personal property received by him in virtue of his office. The criminal

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prosecution which gave rise to the property clerk's possession terminated and the plaintiff, thereupon, demanded her property.

The defendant refused to give it up, because R. & W. Simpson, pawnbrokers, claimed possession of the property under a lien which they asserted thereon. The plaintiff thereupon commenced proceedings of claim and delivery in the New York marine court. The defendant declined to deliver the property to the sheriff, and moved to interplead the Simpsons by applying for an order discharging him from the record and substituting them in his place. Judge McADAM, before whom the motion was argued, denied the application upon various grounds, among others, that section 216 of the Code had not been complied with and that the defendant had not obeyed the process of the court by delivering the property to the sheriff, and thus putting it under the control of the court, and that the court would not accept a conditional compliance with its order. The defendant appealed to the general term of the marine court, and after argument before ALKER, C. J., SHERIDAN and SINNOTT, JJ., the order of Mr. justice McADAM was, in all things, reversed and the defendant's motion for interpleader was granted.

The plaintiff thereupon appealed to the New York common pleas, general term, where the matter was argued before DALY, C. J., and VAN HOESSEN, J., and the order of the marine court, general term, was, in all things, reversed, and the order made by Mr. justice McADAM at special term was restored and affirmed in and by the following opinion:

Morris S. Wise, for plaintiff and appellant.

Charles F. Maclean, for defendant and respondent.

DALY, C. J. — The order is appealable. It is a final determination of the action brought by the plaintiff against St. John as it provides that upon the delivery of the property which

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St. John has in his charge to the sheriff, he is to be discharged from all liability therefor to the plaintiff. In place of the present action it substitutes another action which the plaintiff has not asked for against other persons, Robert Simpson and William Simpson. It directs that they shall be substituted in the place of the defendant St. John, and it has been already held that such an order is appealable (*Wilson agt. Duncan*, 9 *Abb. Pr.*, 3).

The defendant St. John, upon his own motion, applied to the court below to substitute the Simpsons in his place as the defendants in the action and to discharge him from liability on delivering the property or its value to such persons as the court might direct. Judge McADAM, to whom the application was made, denied it upon the ground that it was the duty of the defendant to obey the process of the court, and that in respect to the application to interplead the Simpsons as defendants the Code has provided what course is to be pursued, where the property sought to be replevined by the plaintiff is claimed by another person, and which necessarily excluded any other procedure by or on behalf of the Simpsons as claimants. The general term reversed the order denying the application without giving any reason for the reversal, so that we are left entirely in the dark as to the ground upon which they decided that the application should have been granted and made the order they directed to be entered.

This was an action of replevin and the third subdivision of the one hundred and twenty-second section giving the court discretion to substitute for the defendant in the action, a party who makes a claim against the defendant for the property, is necessarily to be interpreted in connection with the two hundred and sixteenth section, which provides that if the property taken in an action of claim and delivery be claimed by any other person than the defendant, such person shall make an affidavit of his title to the property and the right to the possession of it, stating the ground of such right and title, and

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serve the same upon the sheriff, after which, by the provisions of the section, it is made incumbent upon the plaintiff to indemnify the sheriff against such claim, by the undertaking therein provided for. In this case, as appears from the affidavit of the sheriff, the defendant refused to give up the property in obedience to the process, alleging no reason or excuse therefor. He afterwards applied for an order substituting the Simpsons as defendants in his place, and discharging him from all liability to either party upon his delivering up the property to such persons as the court should appoint, and, as I have said, judge McADAM *held* that he had no right to impose any such condition; that he must obey the process of the court the same as any other party against whom an action is brought. His application to have the Simpsons interpleaded as defendants in his stead was made conjointly with them, as an attorney appeared on their behalf upon the motion and made an affidavit to the effect that they claimed the right to hold the property as bailees, that they consented to be interpleaded as defendants in the action and that they demanded that the property upon such interpleader should be delivered to them.

The decision of the judge below, in my opinion, was right. The proper course to be pursued in such a case, was for the defendant to deliver up this property to the sheriff in obedience to the process and for Simpsons to make the affidavit provided for by the two hundred and sixteenth section, and serve it upon the sheriff who could deliver it to them, if not indemnified after a reasonable time, by the plaintiff; this was the regular and proper course of procedure, both on the part of the defendant St. John and of the claimants Simpsons.

Upon thus interposing their claim to the property as against the defendant, the defendant would be in a position to apply to the court to interplead them as defendants and to be discharged himself from all further responsibility, the property then being in the custody of the sheriff under the process in this action. No reasons, as I have said, have been given by

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the general term for the order which they made, substituting the Simpsons as defendants, in place of the defendant St. John and discharging the defendant from all responsibility upon delivering the property to the sheriff who, by the order of the general term, is appointed to receive it and to hold it subject to the further order of the court, and I refer to this omission as it appears to me very plain that the defendant was not justified in disobeying the process of the court, lawfully issued, but was bound to obey it the same as any other public officer against whom an action is brought. If there was any reason why the property, for public purposes, should remain in his possession, his course was to apply to the court, which has authority to control its own process.

The ground taken by the respondent upon the appeal in support of the decision of the general term is, that the property is in the custody of the law; that the defendant is the property clerk of the police department, and that this property, a diamond ring and chain, was delivered to him, as property clerk, by a member of the police force of this city; that it is consequently in his custody, in conformity with the provisions of the act of 1873 (*Laws of 1873, chap. 335, p. 500, secs. 61 to 66*), and that no action of replevin will lie at the suit of any one to take it out of his possession.

It has been long and well settled that replevin will not lie to recover property which is in the custody of the law, as where property found in the possession of the defendant in the execution is levied upon by the sheriff, in which case replevin cannot be brought as to take the property out of the possession of the sheriff, for his possession is the possession of the law and the remedy of any one aggrieved by the seizure of it is an action, in the nature of an action of trespass, to recover damages for the wrongful taking of it (*Hall agt. Tuttle, 2 Wend., 475, the cases there cited*).

If, however, it was taken out of the possession of one who was not the defendant in the execution, then replevin will lie to recover the possession of it; for, not having been taken in

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accordance with the direction in the writ of execution which was to take the property of the defendant, it is not in the custody of the law (*Clark agt. Skinner*, 20 *Johnson*, 465). There were reasons which will be found stated in *Hall agt. Tuttle* (*supra*, p. 477) why the action of replevin, before it was remodeled by the Revised Statutes, was not adapted as a remedy where property in the possession of the defendant in the execution was levied upon by the sheriff, or was distrained upon a conviction (*Rex agt. Markhouse, Str.*, 1184), which do not apply to the extent that they did previously to the action of replevin, or claim and delivery in its present form, and which do not apply at all to the possession which the property clerk has of property under the act of 1873.

It may be that the property in his possession might be regarded as in the custody of the law, where it is held upon the ground that the possession and use of it is or may be necessary to secure the conviction of the person charged with having stolen it, but after his conviction or acquittal the property clerk can have no claim to it as against the rightful owner.

The act of 1873 (*sec. 62*) provides that where the property has been taken from the person arrested and is alleged to have been feloniously obtained and the magistrate is thereafter, upon investigation, satisfied that the person accused is innocent and that the property rightfully belongs to him, that the magistrate may make a written order that the property clerk deliver it to the accused person.

This is the only provision in the act relating to the restitution of property in the custody of the property clerk; and in such a case he may rightfully refuse to deliver it, unless upon the written order for which provision is made in the act. But the position taken by the defendant here in refusing to obey the process of the court in the replevin suit goes far beyond this. He claims that all property that comes into his possession is in the custody of the law; that he may refuse to give it up to the rightful owner, and that no action will lie to

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compel him to do so, which would make him the perpetual custodian of all property which is in his possession as property clerk, and leave it entirely dependent upon him whether the true owner thereof should get it or not, a position the preposterous nature of which is apparent in the mere statement of it.

All that was enacted in the provisions of the charter of 1873 was, that there should be a property clerk into whose custody should be given and left all property or money alleged, or supposed to be feloniously taken, or which should be lost or abandoned, or which should be taken into the custody of any member of the police force, police justice or criminal court; and that all such property should be particularly registered by the clerk in a book to be kept for that purpose.

There is nothing in this public regulation in any way affecting the right of the true owners of such property, or divesting them, even temporarily, of their right to claim it; nothing which takes away from them the right which every citizen has to bring his action to compel the delivery to him of property wrongfully withheld from him, or which leaves it to the property clerk as sole arbiter to decide to whom the property belongs and to give it or withhold it as he thinks proper.

The right to property and to its possession is determined by the law in a proper action brought for that purpose by the one who claims it, and the act of 1873 has not inaugurated any other or different course of procedure.

If the property clerk of the police department refuses to give up property which comes into his possession alleged to be, or under the suspicion of having been, stolen, or as lost or abandoned, or which was received by him from a police officer, magistrate or criminal court upon the ground that he is entitled by virtue of the authority conferred upon him by his office to hold it against claimants he must answer in the action brought against him the same as any other public officer against whom an action is brought. He must show his official right to hold it the same as any other public officer

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who is sued for wrongfully withholding property from the alleged rightful owner and not as the defendant has done in this case, in the language of judge McADAM, put the process of the court at defiance.

The order of the general term, therefore, should be reversed leaving the defendant to obey the process which requires him to deliver up the property into the custody of the sheriff and the Simpsons to make their affidavit and serve it upon the sheriff in the mode provided by the two hundred and sixteenth section, if they make any claim to the property.

VAN HOBSEN, J., concurred.

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SUPREME COURT.

THE PEOPLE *ex rel.* ADOLPH LOUENBEIN agt. CHARLES
DONOHUE, Justice, &c.

Jurisdiction — Marine court — Stilwell act.

The marine court of the city of New York is a court of record, to and for all intents and purposes, and has jurisdiction of all the proceedings authorized by the act to abolish imprisonment for debt, passed in 1881, commonly called the Stilwell act.

General Term, First Department, October, 1878.

PROCEEDINGS under the non-imprisonment act were commenced in the marine court of the city of New York against Marks H. Julian as a fraudulent debtor. After an examination and hearing Mr. justice McADAM found him guilty and committed him to jail according to the provisions of the act. Julian, who was arrested under this commitment, sued out a writ of *habeas corpus* and *certiorari* from the New York supreme court, under which he was discharged from custody, by Mr. justice DONOHUE, upon the ground that the marine court had no jurisdiction of Stilwell act proceedings. From this order the relator removed the matter to the general term upon *certiorari* and appeal.

Adolph Czaki, attorney for relator.

S. M. Ehrlich, attorney for respondent.

POTTER, J. — This is a *certiorari* to the respondent to review his decision discharging Marks H. Julian upon a writ of *habeas corpus* from imprisonment under a commitment made by one

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of the justices of the marine court pursuant to the provisions of the act to abolish imprisonment for debt.

The relator, doubting whether a *certiorari* was the appropriate remedy, also brought an appeal under section 1356, Code of Civil Procedure.

The respondent objected that the writ of *certiorari* was improper because there was a remedy by appeal, and that the appeal was premature and unauthorized because the order appealed from had not been entered with the clerk of this court. The allowance of the writ of *certiorari* was discretionary, and while the general rule is, as claimed by the people's counsel, that the writ will not, in the exercise of judicial discretion, ordinarily be granted where there is a remedy by appeal, yet its allowance is not absolutely inhibited in such a case.

In regard to the objection that the appeal was taken before the entry of the order appealed from, it is sufficient to say there is no proof before the court that the order was not in fact entered. The question involved is one of considerable practical importance, and it is, therefore, desirable that a decision of it be had without delay on account of technical objections.

The question is, whether a justice of the marine court has power to issue a warrant for the arrest and commitment of a party in virtue of proceedings under the act to abolish imprisonment for debt, &c., passed April 26, 1831, and the acts amendatory of the same.

By section 3 of the non-imprisonment act the plaintiff may, in any action or upon any judgment obtained in a court of record, apply to any judge of that court for a warrant to arrest the defendant for the causes specified in section 4 of that act.

Is the marine court of the city of New York a court of record?

We find, by reference to the statute (2 *R. Laws*, 361, *sec.* 106), that such court is declared to be a court of record. It is to be presumed that the legislature intended to convey the

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same meaning in the use of the expression "court of record" in the statute of 1831 as in the statute of 1813.

But if we trace the history of the various statutes in relation to the marine court, or consider the jurisdiction it has at all times exercised in common-law actions from its organization to the present time with its appointments, officers and its various proceedings, it will impress every legal mind that it is a court of record.

It has and has had a clerk and a seal. It possessed the power to naturalize citizens until jurisdiction over that subject was taken from it by an act of the legislature passed as far back as 1852.

It has jurisdiction to entertain supplemental proceedings upon its own judgments in the same manner as courts of record (*In the Matter of Lippun*, 48 *How. Practice R.*, 359).

By an act passed April 14, 1865, the legislature provided for references, voluntary and involuntary, of actions pending in that court and prescribed the mode of reviewing and entering judgments upon the report of the referee, and, in brief, conferred upon this court all the powers possessed by any common-law court of record in relation to references, costs and extra allowances. It has appellate jurisdiction to review a judgment rendered by one of its justices.

The legislature, in 1874 (*chap.* 545), authorized the judges of any court of record in New York city to send any action pending therein to the marine court. It is true that act, by a divided court, was held unconstitutional, not because the marine court had not jurisdiction, but because no court can divest itself of the duty of entertaining cases that parties choose to bring in that court (*Alexander agt. Bennett*, 60 *N. Y.*, 204).

In 1872 the legislature passed an act (*chap.* 629) declaring it to be a court of record and using this significant language, to wit: "to and for all intents and purposes," greatly increasing its jurisdiction and providing that the forms of process and proceedings prescribed by the Code of Procedure in

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respect to the other courts of record should apply to this court.

In 1875 the legislature, by chapter 479 of the Laws of that year, clearly recognized this court as having jurisdiction under the act of 1831, the non-imprisonment act.

It provided, in section 2, that no person should be arrested in said marine court except as prescribed by that act, *but this provision shall not affect the act to abolish imprisonment for debt and to punish fraudulent debtors*, passed April 24, 1831, or any act amending the same.

Its jurisdiction under the act of 1831 is again expressly recognized by the act itself.

Section 47 of said act provides that section 29 and the subsequent sections shall apply to this court. Section 29 contains the provision which enables a plaintiff to examine the defendant in relation to the fraudulent transactions specified in the act; and those examinations can only be had upon the arrest of the defendant upon a warrant issued by a judge of a court of record.

We next notice the declaration in the Code of Civil Procedure. Section 2 declares that the marine court of the city of New York is a court of record. This act professes to be a revising and not a creative act.

From these and similar enactments not deemed necessary to be specified we are brought to the conclusion that the marine court had jurisdiction of the respondent in the proceedings under the non-imprisonment act, and the order granting his discharge should be vacated and the respondent be subjected to the warrant of commitment and the further prosecution of the proceedings.

As the question involved is one of doubt and seems to have been disposed of by the court below with a view of having the same presented and decided by the general term and, perhaps, by the court of last resort, and as the costs are in the discretion of the court, we think no costs should be awarded

INGALLS, J., concurred.

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NEW YORK COURT OF APPEALS.

ANTON SCHWARTZ *et al.*, plaintiffs and appellants, agt. WILLIAM
OPPOLD *et al.*, defendants and respondents.

Appeal—Order of general term, New York marine court, reversing order of trial judge granting new trial is appealable to common pleas—When determination by general term marine court conclusive—Promissory note—evidence under general denial—when objections to proof must be made—too late to object to verification of pleadings upon the trial.

Where the general term reverse an order of the special term granting a new trial on the ground that the verdict is against evidence the determination by the general term is conclusive.

Where the complaint sets forth a note payable on demand, *with interest*, it is competent for the defendant, under an answer containing a mere *general denial*, to show that the note had been altered since its execution by adding the words "with interest." This alteration, insufficiently explained, vitiated the note.

Objections to proof must be specifically made at the trial in all cases where they might then have been obviated by an amendment of the pleadings, and it is too late to object to the verification of the pleadings upon the trial.

The conflict in the law as laid down in *Boomer agt. Koon*, as reported in 6 *Thompson & Cook, Supreme Court Reports*, 645, and in 6 *Hun*, 645, settled.

An order of the general term of the New York marine court reversing an order of the trial judge granting a new trial amounts to an affirmance of the judgment and is, consequently, a final determination by that court sufficient to make the order appealable to the New York common pleas.

Decided September, 1878.

THE plaintiffs sued, in the New York marine court, to recover upon a promissory note made by the defendant Oppold and indorsed by his wife who was made codefendant.

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The complaint* declared upon a note as payable on demand, *with interest*. The defendants, by way of answer, interposed a mere general denial. Upon the trial they were allowed to prove, under objection, that the note had been altered since its execution by adding the words "with interest," and that the special provision by which the indorser charged her separate estate had been added after she had signed her name.

The jury found for the defendants, holding that the alterations charged had in fact been made. The trial judge (justice GOEPP) subsequently granted a new trial upon the authority of *Boomer agt. Koon*, which case, as reported in 6 *Thompson & Cook, Supreme Court Reports*, 645, holds that "the defense that a note had been altered after execution was not admissible under a general denial" (*Opinion by MULLIN, J.*). The *same case* is reported as holding directly the opposite in 6 *Hun*, 645. (*Opinion by E. D. SMITH, J.*, concurred in by MORGAN, J., and the opinion of MULLIN, J., before referred to, is here reported as a dissenting opinion.)

From this order the defendants appealed to the general term of the marine court, which held (ALKER, SHEA and McADAM, JJ., presiding) that the order granting the new trial was erroneously made and that the verdict must be allowed to stand. From this order of reversal the plaintiffs appealed to the New York common pleas, where it was claimed that a mere order granting a new trial was not appealable to that court. The general term of the common pleas (DALY, C. J., ROBINSON and LARREMORE, presiding) held, June 4, 1877, per DALY, C. J.: "The effect of the order and decision of the general term of the marine court are to affirm the judgment. As it reversed the order granting the new trial it is, consequently, a final determination in the marine court." The common pleas, after argument, affirmed the marine court, general term, and, on account of the conflicting report of the case of *Boomer agt. Koon (supra)*, allowed the case to go to the court of appeals, and that court has disposed of the matter in the following opinion:

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Samuel Hand and *Henry Wehle*, attorneys for plaintiffs and appellants.

Peter Cook, attorney for defendants and respondents.

RAPALLO, *J.* — The question whether the verdict was against the weight of the evidence cannot be considered on this appeal. The general term having reversed the order at special term granting a new trial must have been of opinion that the verdict was not against the weight of the evidence. That question the general term had power to decide, and its determination thereon is final.

The only points before us are those which arise on the exceptions taken at the trial. The exception mainly relied upon was to the admission of the evidence of the defendant, William Oppold, to the effect that the words "with interest," which appear at the end of the note given in evidence, were not there when he signed it. The objection taken was that no such defense was pleaded.

The complaint set forth a note payable on demand with interest. The answer of the maker, William Oppold, contained a general denial. The note put in evidence purported to be payable with interest as alleged in the complaint. It was clearly competent for the defendant under his general denial to controvert this proof by showing that the note had been altered since its execution by adding the words "with interest." This alteration, which was established by the finding of the jury, clearly destroyed the effect of the note as evidence and precluded any recovery thereon in the absence of sufficient explanation of the alteration.

The defendant also gave evidence to the effect that the special indorsement by which the defendant, Louisa Oppold, charged her separate estate had been added after she had signed. A general objection was taken to the question put to her whether the writing above her signature was there when she signed. The question was material and admissible as against a general objection.

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If it was intended to raise any question as to its admissibility under her answer the objection should have been specifically taken; and in that case it could have been obviated by amendment. No such objection was interposed. The only question raised with respect to the answer of the defendant, Louisa Oppold, was that it had not been properly verified. That objection was not a proper one to be raised at the trial.

The questions of fact, whether the note and indorsement had been altered after the defendants had affixed their respective signatures, were submitted to the jury on conflicting evidence and they found for the defendants.

The general term of the marine court having approved the verdict we cannot interfere with it; and there being no valid exception in the case the judgment must be affirmed.

CHURCH, C. J., FOLGER and ANDREWS, JJ., concur; MILLER and EARL, JJ., absent.

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SUPREME COURT.

In the Matter of the Application of the ATTORNEY-GENERAL
of the State of New York agt. THE NORTH AMERICAN LIFE
INSURANCE COMPANY.

*Insurance company—proceedings under act of 1853 to distribute assets—
Receiver—suit against—power of supreme court to enjoin action—where
and when such power may be exercised.*

The supreme court, in special proceedings pending before it for the purpose of distributing the effects of a dissolved corporation, *i. e.* (a life insurance company), (pursuant to chapter 463, Laws of 1853, and chapter 902, Laws of 1869), has power to enjoin an action brought by a policyholder of such corporation against the receiver appointed in such special proceedings for the purpose of ascertaining and declaring the debts and obligations of the corporation, and for the distribution of its assets.

A motion by the receiver to stay such suit need not, of necessity, be made in the district where the action is pending.

Even where an action is pending in one district and a suit is brought in another to restrain it, the court may interfere in the latter district.

The jurisdiction of the court to interfere is undoubted where the case is pending in one district, and on a second suit being brought in another, for the *same purpose*, the party who is thus sued moves in the first action to stay the second.

The fact that the proceeding first instituted is not an action, *eo nomine*, makes no difference. As the court has power in this proceeding to distribute the assets of the dissolved corporation, it will enjoin and restrain any individual who seeks by a new and unnecessary action to deprive it of its power.

A proceeding to wind up and dissolve a corporation and distribute its effects was specially provided for by the act (*Laws of 1853, chapter 463, section 11*), and, consequently, no action can *now* be maintained by a creditor or a stockholder under the Revised Statutes for a similar object. What a creditor or a stockholder could not do before the attorney-general and the court have acted under the statute of 1853, it ought not

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to be allowed to do after such action (*See Attorney-General agt. The Continental Life Insurance Company*, 53 How., 16).

Under the Revised Statutes, when an action had been brought to dissolve and distribute the assets of an insolvent corporation, the remedy of every creditor was in that suit and proceeding only, and in the district in which the same was pending, and the same rule applies in proceedings to dissolve and distribute the assets of an insolvent corporation under the act of 1853.

Where an order has been granted by a judge of the supreme court allowing a suit to be brought against a receiver upon its being made evident that such order was improvidently granted, there is no impropriety in another judge directing an order to be entered withdrawing the consent to bring such suit. It was the consent of the same court which was obtained, and it can properly be withdrawn by the same tribunal which granted it though sitting now in another district (*See McArdle agt. Barney and others*, 50 How., 97).

Ulster Special Term, October, 1878.

MOTION by the receiver of the above-mentioned corporation to stay a suit against him.

R. W. Peckham, for motion.

Stanley, Brown & Clark, opposed.

WESTBROOK, J.—The North American Life Insurance Company was organized under chapter 463 of the Laws of 1853, and it also transacted business as a registered policy company under chapter 902 of the Laws of 1869.

At a special term of this court held in the city of Schenectady by Mr. justice LANDON, on the 8th day of March, 1877, on the motion of the attorney-general of the state, after due notice to the company, such corporation was restrained from the further prosecution of its business and Henry R. Pierson appointed the receiver thereof.

After this appointment the receiver, with the approval of the superintendent of the insurance department, appointed an actuary who, in conformity with the requirements of section 8 of said chapter 902 of the Laws of 1869, made a careful investigation into the affairs of said company and reported,

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after such investigation, that the assets of the said corporation were not sufficient to meet its liabilities and the costs of the receivership. Such report was presented to the court and its conclusions affirmed by order duly entered.

On the 16th day of January, 1878, upon an order to show cause duly served, and upon the application of the attorney-general, this court, at special term held by Mr. justice LANDON in the city of Schenectady, granted a second order under section 17 of chapter 463 of the Laws of 1853 dissolving the corporation and again appointing Mr. Pierson its receiver.

On the 16th day of July, 1878, this court, at a special term also held in the city of Schenectady by Mr. justice LANDON, made an order appointing Albert Parsons, Esq., counselor at law of the city of New York, a referee to ascertain the claims against such company. The order contains full directions to such referee to give notice by publication for all creditors to present and establish their claims and to make full report to the court. The object of this order evidently was to ascertain what were valid debts and obligations against the corporation, with a view to the distribution of its assets among them, as the court is empowered and required to do by both the acts aforesaid.

Subsequent to such last-mentioned order, and on or about July 20, 1878, one Benjamin Reis, in behalf of himself and all other creditors of the said, The North American Life Insurance Company, who should come in and contribute to the expense thereof, brought a suit against the said corporation and the said Henry R. Pierson, its receiver, for the purpose of ascertaining and declaring the debts and obligations of the corporation, and for the distribution of its assets, or, to speak more plainly, a policyholder of the late corporation has brought an action in this court against the court's own receiver to do the very things which the court, without such suit and without its aid, was fully competent to do, and was actually and in due form proceeding to do. That action this motion seeks to enjoin and restrain.

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The first question which this motion presents is, has this court, in the special proceedings pending before it for the purpose of distributing the effects of a dissolved corporation, power to enjoin the action? It will be observed that the suit is against the court's own officer, and the necessary and inevitable effect thereof is, more or less, to interfere with the action of the receiver. If a person molested a receiver in any way other than by action, would it be seriously argued that the court could not restrain him? If the answer to the question is favorable to the power of the court to interfere then, why may it not do so now? It is an individual who is hampering and annoying the receiver in his trust, and the mode of annoyance does not alter the power of the court. The court, for its own dignity, will arrest and punish an interference with its receiver, and the mode and manner which the party has taken to interfere cannot take away the jurisdiction of the court. The plaintiff in the action has seen fit to interfere with a receiver duly appointed by bringing an action in a locality and district distant from that in which such receiver was appointed; and having paid no attention himself to the rights or convenience of the receiver, he is in no situation to ask that protection should be sought in the district which he has chosen. This is not a case where an action is pending in one district and a suit is brought in another to restrain it, though even then the court could interfere in the latter district (*Erie Railway Co. agt. Ramsey*, 45 N. Y., 637). It is rather analogous to the case of one pending in one district, and on a second suit being brought in another for the same purpose the party who is thus sued moves in the first action to stay the second. The jurisdiction of the court in such a case is too undoubted to be questioned. The fact that a proceeding first instituted is not an action, *eo nomine*, makes no difference. It was something, whether it be called an action or special proceeding, which gave this court full power over the corporation and its assets for the purpose of distribution in and by that proceeding; and as a grant of power to do an

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act is also a grant of power to do every other act and thing necessary to be done in the progress of its accomplishment, it necessarily follows, as the court has power in this proceeding to distribute the assets of the dissolved corporation, it will enjoin and restrain any individual who seeks by a new and unnecessary action to deprive it of this power. This suit, brought by Ries, is in this (the supreme) court, and it would be a little singular if the court itself, which alone is interfered with, must speak in behalf of its own dignity and its own protection in the spot and locality which he has chosen and which he dictates as the only one for it to assert its rights and its prerogatives.

Of the power, then, to enjoin this action, there can be no doubt, and we next inquire why should not the power be exercised? Of what possible use is the action? The statutes, under which Mr. Pierson was appointed receiver, are ample to protect all parties interested. Under them this court must, and is proceeding to, distribute. All its powers are in full and complete exercise, and whilst the legal machinery of the court requires no aid a suit is brought for the ostensible purpose of giving assistance when none is sought or required. It is brought, too, in the same court, which has already complete jurisdiction, and to which the suit can add nothing, or from it subtract nothing. But the action is more objectionable, even, than we have stated. The supreme court is holding the property through Mr. Pierson, its own receiver, for the purpose, when it shall, by its reference already ordered, ascertain who the creditors are, of directing "a distribution of its effects" (*chapter 453, Laws of 1853, section 17; chapter 902, Laws of 1869, section 8*), and an action has been brought in the same court against itself (for one against its receiver who is acting under its orders is one against the court) to quicken its action and to guide its judgment. The statement of the proposition is enough without argument. No fraud, no collusion, wrong or negligence is imputed to the receiver, and if they were the court can act on motion; but the simple

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and only aim of the action is declared to be to facilitate the receiver and court in the execution of their trust. I have been unable to see that either requires that aid; and as that action will necessarily hamper the court and receiver and greatly increase the costs and expenses of the trust the action must be enjoined.

There is another objection, also, to the maintenance of this action which has not been stated. The act of 1853, under which Mr. Pierson was appointed receiver, by its eleventh section makes all companies formed under it subject to all the provisions of the Revised Statutes in relation to corporations, "so far as the same are applicable, except in regard to annual statements and other matters herein otherwise specially provided for." This court, in *Attorney-General agt. The Continental Life Insurance Company* (53 Howard, 16), held that a proceeding to wind up and dissolve a corporation and distribute its effects was specially provided for by the act, and that, consequently, no action could be maintained by a creditor or a stockholder, under the Revised Statutes, for a similar object. This decision, though made at special term, was acquiesced in by the parties affected by it, and has generally been regarded as sound by the profession. What a creditor or a stockholder could not do before the attorney-general and the court have acted under the statute of 1853, it surely ought not to be allowed to do after such action; and precisely this the suit brought aims to do, to wit, to distribute the effects of the corporation whilst the court is acting under the act aforesaid. Under the Revised Statutes when an action had been brought to dissolve and distribute the assets of an insolvent corporation the remedy of every creditor was in that suit and proceeding only, and in the district in which the same was pending (*Rinn agt. The Astor Fire Insurance Company*, 59 N. Y., 143). Though the mode of procedure against the corporation may be changed all other provisions, "so far as the same are applicable," remain unaltered and unaffected. The same provisions of the statutes and the same rules of equity which induced

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the court of appeals to hold as it did in the case just cited apply to the one before us. The plaintiff in the suit brought and all other creditors must seek their remedies in this proceeding and in the district in which it is pending. The law requires this as well as the danger of a conflict of jurisdiction and needless additional expense and costs; and for this reason, also, the motion must be granted.

The order allowing the suit to be brought was improvidently granted, and one withdrawing the consent to bring it must be entered. It was the consent of this same court which was obtained, and it can properly be withdrawn by the same tribunal which granted it, though sitting now in another district (*McArdle* agt. *Barney and others*, 50 *Howard*, 97).

Argall agt. Jacobs *et al.*

SUPREME COURT.

THOMAS M. ARGALL agt. ABRAHAM JACOBS *et al.**New trial on the minutes and on ground of surprise.*

Where a party moved at the circuit for a new trial on the minutes and on the ground of "surprise:"

Held, that under section 1002 of the Code of Civil Procedure the motion could not be heard at the *circuit*, in so far as "surprise" was urged as a ground, but should be brought on at special term.

Section 999 discloses the grounds upon which a new trial may be granted at the circuit.

Lobby agt. Strasburger (14 *Hun*, 120) applied in a case where fraud was charged in contracting a debt claimed to be discharged in bankruptcy.

MOTION for new trial on the *minutes* and upon the ground of surprise made at the term during which the trial was had.

R. S. Newcombe, for motion.

D. C. Briggs, opposed.

VAN VORST, *J.* — This motion, in so far as it asks for a new trial on the ground of surprise, I think, must be made at special term.

Section 1002 of the Code of Civil Procedure provides, that in a case not specified in the three preceding sections the motion for a new trial must, in the first instance, be heard and decided at special term.

The preceding sections alluded to, do not include a motion for a new trial on the ground of surprise.

The grounds upon which a motion for a new trial may be

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urged before the judge who presided at the trial, are stated in section 999, and do not embrace that of surprise.

Upon the question, therefore, of surprise raised by the affidavits I cannot pass.

Upon the trial, when my attention was called to the case of *Libby, Survivor, &c.*, agt. *Strasburger*,* I followed what I understood to be the decision of the general term in that case and admitted the evidence of fraud in contracting the debt, which the defendant claimed was discharged by the proceedings and decree in bankruptcy.

The evidence having been submitted to the jury as to this question there is no reason why I should interfere with the verdict so far as it disposes of that subject.

The question as to whether the evidence was admissible under the complaint is an important one and I do not think wholly free from doubt.

The rulings on this subject give occasion to the motion for relief on the ground of surprise.

Upon reflection I think it best to adhere to the rulings on the trial; the question being one of law raised by the defendants' exceptions can be more appropriately disposed of at the general term.

The motion is denied upon grounds not involving the question of surprise.

* 14 Hun, 120.

Combs agt. Dunn.

SUPREME COURT.

AARON COMBS agt. JAMES DUNN.

Action — Complaint — Order of arrest — what allegations in complaint show the action to be in tort — fraud must be proved in order to recover.

Where the complaint averred that the defendant, with intent to deceive and defraud the plaintiff by inducing him to sell a certain horse to the defendant, represented to the plaintiff that he, the defendant, owned the whole of the premises occupied by him and all he owed was about \$200, by which representations plaintiff was induced to sell and deliver to defendant a horse of the value, and for which defendant promised, by a promissory note delivered at the same time, to pay the sum of \$110; that said representations were false, in that defendant did not own said premises, nor the whole of them, but occupied the most valuable portion of them on a contract on which nothing, except the interest, had been paid at the time the aforesaid representations were made; that he owed at that time exceeding \$200, and still owes it; that he knew when said representations were made that said things were so; an order of arrest was granted upon the ground of false and fraudulent representations:

Held, that the complaint was in fraud and not on contract, and that the plaintiff could not recover without proving the fraud alleged, and that the motion to vacate the order of arrest should be denied.

Livingston Special Term, June, 1878.

MOTION by defendant that order of arrest be vacated, or that plaintiff be required to amend complaint by striking out all causes of action except that on which he is entitled to an order of arrest, and that he be required to elect upon which cause of action he will rely.

The complaint avers that the defendant, about the 12th day of December, 1877, with intent to deceive and defraud the

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plaintiff by inducing him to sell a certain horse to the defendant, represented to the plaintiff that he, the defendant, owned the whole of the premises occupied by him, and all he owed was about \$200; that he owned it, and he alone, and all his debts did not amount to over \$200; that plaintiff relying on such representations was thereby induced to sell and deliver to defendant a horse of the value, and for which the defendant promised to pay the sum, of \$110 as set forth in the terms of a promissory note made and delivered on the date aforesaid by the defendant to plaintiff, by which defendant promised to pay to Aaron Combs, or bearer, the sum of \$110 by the 1st day of April, 1878, with interest, and of which note the plaintiff is still the owner and holder; that said representations were false, in that defendant did not own said premises, nor the whole of them, but occupied the most valuable portion of them, and on which the buildings stand under a contract with one Glady, and on which contract nothing except the interest had been paid at the time the aforesaid representations were made, and that the whole, or very nearly the whole, sum on said contract still remains unpaid; that he owed at that time exceeding \$200, and still owes it, and that he knew when said representations were made that said things were so; that no part of the price of said horse or the note aforesaid has ever been paid, and that plaintiff has suffered loss and damage by the fraud of the defendant aforesaid to the amount of \$110 and interest.

Prays judgment for \$110 and interest from 12th day of December, 1877, and costs.

The order of arrest was granted by the county judge of Allegany county upon the ground of false and fraudulent representations made by the defendant in the purchase of a certain horse on credit from the plaintiff.

E. C. Olney, for motion.

W. C. Windsor, opposed.

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ANGLE, J. — The alleged ground of this motion is, that the complaint contains two causes of action, one for fraud and the other on contract, in one of which the right to an order of arrest depends on the nature of the action and in the other it depends upon extraneous facts. In either view I see no ground for vacating the order of arrest. For the balance of the motion, viz., that the plaintiff be required to amend his complaint by striking out all the causes of action therein contained, except that on which he is entitled to an order of arrest, and that he be compelled to elect upon which cause of action he will rely, the question still remains whether this complaint does in fact contain the two causes of action as alleged.

I shall not go through and analyze the cases bearing upon the point, but will refer to the more prominent ones in the highest courts (*Elwood agt. Gardner*, 45 *N. Y.*, 349; *De Graw agt. Elmore*, 50 *id.*, 1; *Ross agt. Mather*, 51 *id.*, 108; *Dudley agt. Scranton*, 57 *id.*, 424; *Graves agt. Waite*, 52 *id.*, 156; *Barnes agt. Quigley*, 59 *id.*, 265; *Greentree agt. Rosenstock*, 61 *id.*, 583; *Mathews agt. Cady*, 61 *id.*, 651) and state, as my conclusion, that the complaint in this action is in fraud and that the plaintiff cannot recover without proving the fraud alleged. *Peck agt. Root* (5 *Hun*, 547) is quite in point, though there may be some question whether one of the reasons given in the opinion (*p.* 550), viz., "pleadings are to be construed most strongly against the pleader," is sound. In *Olcott agt. Carroll* (39 *N. Y.*, *p.* 438), judge WOODRUFF, speaking for the court, says: "It is not true that, under the Code, if there be uncertainty in respect to the nature of the charge it must be construed strictly against the pleader;" while commissioner HUNT, in *Bunge agt. Voop* (48 *N. Y.*, *p.* 231), applies "the principle that the pleading is to be construed most strongly against the pleader" as useful in that case.

The motion is denied, but, as there is such a conflict or confusion of cases, it is without costs.

Nason agt. Luddington.

N. Y. COMMON PLEAS.

EMILIE NASON agt. BENJAMIN L. LUDDINGTON.

Referee's oath — in what manner may be waived — Code of Civil Procedure, section 1016.

The failure of a referee to be sworn; in pursuance of the provisions of section 1016 of the Code of Civil Procedure, is a mere irregularity and not a jurisdictional defect and may be waived by implication (*Affirming, S. C., 55 How., 342*).

General Term, November, 1878.

Before DALY, Ch. J., and VAN HOESSEN, J.

Theodore Arnold, for plaintiff.

Geo. W. Lord, for defendant.

VAN HOESSEN, J. — The Revised Statutes (2 R. S., 384, sec. 44) provided that before a referee should proceed to hear any testimony in the cause he should be sworn faithfully and fully to hear and examine the cause, and to make a just and true report according to the best of his understanding. That provision of the Revised Statutes is, in substance, re-enacted by section 1016 of the Code of Civil Procedure. It was, on several occasions, construed by the supreme court and its meaning was generally understood by the profession. In *Whalen agt. Board of Supervisors* (6 How. Pr., 278), where a motion was made to set aside a report for irregularity on the ground that the referee had not been sworn in the cause, and on the further ground that no order of reference had been entered, the court (consisting of justices HARRIS, AMASA J. PARKER and WATSON) decided, that by appearing before the

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referee and proceeding without objection the plaintiff waived the irregularities. Afterwards, in *Keator agt. Ulster and Delaware Plankroad Company* (7 How. Pr., 41), judge HARRIS held that, notwithstanding section 270 of the Code only provided that causes might be referred upon the *written consent* of parties, it was competent for them to agree orally in open court to a reference, and he reiterated his opinion that parties waived the right to require the oath of a referee if they proceeded before him without objection (*See, also, Luddington agt. Taft*, 10 Barb., 447). Upon authority, therefore, it is settled that by the former law it was possible for the defendant in this case to waive, by implication, his right to object to the referee's report; and an implied waiver of the oath is still possible unless the last three sentences of section 1016, which are new, have introduced a rule heretofore unknown to the courts. Those sentences provide that where all the parties whose interests may be affected are of age and are present, they may expressly waive the swearing of the referee, either by written stipulation or by an oral consent entered by the referee in his minutes. It is contended by the counsel for the appellant that the effect of the new provision is to do away with the old rule that a waiver of the oath may be implied from proceeding before the referee without a demand that he be sworn. It is settled that the omission of the referee to take the oath is an irregularity and nothing more. The referee derives his power from the order of the court, and may adjourn the cause, or do many other official acts, without being sworn. It is for the purpose of impressing him with a sense of responsibility in performing the judicial duty of taking the testimony and deciding upon it that the law requires the referee to be sworn. It would seem that if no witness be called, and no documentary evidence be offered, the referee need not take the oath. He might, unsworn, dismiss a complaint as fatally defective in substance, or order judgment upon the pleadings. As he has, to some extent, the powers of a jury, and as the evil he might do is

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irremediable, the law seeks to protect litigants by requiring the referee to act under the solemnity of an oath whenever deciding questions of fact; but as any erroneous legal conclusions which he may announce are easily corrected by the court, where the facts are not in dispute but appear upon the pleadings, there is no occasion for his being sworn when he decides nothing but questions of law. If the taking of the oath were essential to the jurisdiction of the referee of course there could be no implied waiver of that ceremony. But, as has already been said, the failure of the referee to be sworn is a mere irregularity and not a jurisdictional defect. The primary object of the new provisions appears to be to protect infants and absentees. Where there are infant parties, or where there is a party not personally present nor represented by counsel, the oath of the referee, where testimony is to be taken, cannot be dispensed with. There can be no waiver by one who is incapable of giving consent, or by one who is not represented and who knows nothing of the irregularity. But where a party is of full age and present in person or represented by counsel, what reason is there why he or his legal adviser should not ask the referee to be sworn? What principle of ethics or of law requires that a defendant and his counsel, after participating day after day in a long-contested trial without troubling themselves to inquire whether the referee has been sworn, should be permitted, when they ascertain that the report is against them, to spring an objection that the required oath has not been taken? Ought a party thus to be allowed to speculate on the chances of a decision in his favor? This is the result to which we must be brought if the argument of the appellant be sound. Nay, more. If the appellant be correct in his construction of section 1016 we should be compelled to set aside a referee's report where the oath had not been expressly waived by a written stipulation, or by an oral consent entered on the referee's minutes, even though it should be conclusively proved that the referee had stated to the parties, at the beginning of the trial, that he

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would be sworn if either party desired it, and that neither party had taken notice of the referee's offer. It is argued that the words of the new Code are explicit and peremptory. The oath may be *expressly* waived says section 1016. The adverb *expressly* adds nothing to the meaning or to the strength of the language. It is the merest tautology. A written or an oral stipulation that the oath be waived is necessarily an *express* waiver of the oath. If the codifier had contented himself with saying that the oath might be waived by a written consent, or by an oral consent entered in the minutes and had left out the word "expressly," wherein would the meaning of section 1016 be different from what it now is? The word *expressly* adds to the turgidity, not to the meaning, of the language. Section 1016 means, as I understand it, that an express consent to a waiver of the oath must be evidenced by a written stipulation, or by an oral stipulation entered in the minutes. In other words, it is simply making a special application of the general rule that agreements between attorneys as to the proceedings in an action should be evidenced by a writing. But the rule requiring agreements between attorneys to be in writing never encroached upon the law of waiver. It is one of the maxims of the law that the *acquiescence of a party who might take advantage of an error obviates its effect*. The law of waiver has kept its place side by side with the rule requiring stipulations to be in writing, and there is no inconsistency in maintaining both. Section 266 of the Code of Procedure was, except in the use of the word "expressly," almost the same in phraseology as section 1016 of the Code of Civil Procedure. Section 266 provided that a trial by jury could be waived by written consent filed with the clerk, or by oral consent in open court entered in the minutes. If the section had read "*expressly waived*" the meaning would not have been at all changed. Notwithstanding the mode in which the waiver should be evidenced was thus pointed out the court of appeals decided, in *Greason agt. Keteltas* (17 N. Y., 498),

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that a trial by jury would be waived if a party, without objecting, proceeded to a trial of the action by the court. In *McKeon* agt. *See* (51 *N. Y.*, 300) it was held that a jury trial would be waived by a party placing his demand for it upon a ground that was untenable. These decisions, which construe a statute almost identical in language with section 1016, seem to me to be controlling as to the construction of that section, and they leave no doubt that there may still be a waiver, by implication, of the referee's oath.

There are special reasons why the law of waiver should be applied to this case. The appellant says, in his affidavit, that "it never occurred to me that the referee had not been sworn until at *or about* the time the report was made." The appellant is himself a lawyer and was represented by counsel of acknowledged ability. He does not say that he did not know that an oath ought to have been taken by the referee for, undoubtedly, he was well aware of the requirements of the law. At what time "it occurred to him" that the referee had not been sworn he does not clearly state. How long a period is embraced in the expansive term *about* it is impossible to conjecture, but it certainly is possible that whilst the cause was *sub judice* he was canvassing the prospect of setting the report aside if it proved to be unfavorable. Moreover, after the report was made instead of moving promptly to set it aside he took a number of steps toward an appeal from the judgment. The rule is, that if after notice of an irregularity the attorney takes any step in the cause not looking to its correction the court will not interfere to correct the irregularity if merely technical (*Hart* agt. *Small*, 4 *Paige*, 288).

The order appealed from should be affirmed, with costs and disbursements for printing. •

DALY, Ch. J., concurred.

NOTE. — The old Code laid down the general rule that referees must be sworn. This was also the rule under the Revised Statutes. Under the former practice, *i. e.*, the Revised Statutes and Code of Procedure, it was held that although a referee ought to be sworn the oath could be waived

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by implication. Before the Code of Civil Procedure went into effect it was held that any action by the parties which could properly be construed into a waiver, express or implied, dispensed with the requirement of an oath. But in the *new Code* the legislature undertook to declare precisely what sort of a waiver should be necessary to relieve the referee from his obligation to be sworn. *It must be express*; it may be in writing; it may be oral; but in the latter case it *must be entered in the referee's minutes*. It would seem that if the word *must* means any thing it means that an entry of such oral waiver is absolutely requisite to make it effectual. Now, when the law thus specifies several particular ways of taking a case out of the operation of a general rule are not other methods excluded? And when that law omits to mention the method most in vogue before its passage, is not the omission strong evidence of an intent to do away with it? It would seem so to us. It is to be hoped that the court of appeals may be called upon at an early day to decide upon this interesting point. We believe that the doctrine of waiver, as applied to this requirement, tends to laxity in the administration of justice, and has given rise to much vexation which would be avoided by a positive rule of law that the oath should be taken before the referee could acquire any jurisdiction whatever. [Ed.]

Douglass agt. The Mayor.

SUPREME COURT.

GIBSON L. DOUGLASS, committee, &c., &c., agt. THE MAYOR,
ALDERMEN, &c., OF THE CITY OF NEW YORK.

Public administrator — when the city of New York not liable for his acts.

The mayor, aldermen and commonalty of the city of New York are liable for all moneys received by the public administrator according to law, and for the faithful execution of the duties of his office. But for acts illegal and done outside of his office the city is not liable.

Thus where the public administrator, who has in certain cases authority to take charge of the goods, chattels and personal effects of *persons dying intestate*, took into his possession money and property of a *third person* as of the effects of a decedent intestate:

Held, that the city was not responsible for his act.

Levin agt. Russell (42 N. Y., 254) applied.

Also, held, that the record of a judgment against the public administrator, as such, is not evidence in an action against the city of New York, to establish a liability, where the judgment was recovered for acts of the public administrator, which he was not by law authorized to perform.

Special Term, July, 1878.

John Hubbell, for plaintiff.

W. C. Whitney and *F. L. Stetson*, for defendants.

VAN VORST, J. — It is urged by the learned counsel for the plaintiff that this is not an action to enforce an original liability but to give effect to a judgment by which the plaintiff's rights had been determined, and the liability of the defendant, in law and in fact, fixed.

Certain moneys and property which had been received by the public administrator of the city of New York, as and of

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the effects of Richard S. Green, have been adjudged, in an action in favor of the plaintiff against the public administrator, to be the money and property of Catharine M. Bingham, a lunatic, of whose estate the plaintiff is committee. The judgment directed the public administrator to pay over the same to the plaintiff, or so much thereof as remains in his possession.

Upon the trial of this action, the plaintiff offered in evidence the record of the judgment against the public administrator, and claimed that it was final and conclusive and binding upon the defendant.

The admission of the record was objected to by the counsel for the defendant upon the ground that the defendant is not bound by the terms of a judgment against the public administrator, in an action to which it was not made a party.

The public administrator holds his office from the defendant (*R. S.*, vol. 2, p. 118, sec. 1), and the defendant is made responsible for the application of all moneys received by the public administrator *according to law*, and for the due and faithful execution of all the duties of his office (*Idem*, p. 127, sec. 42).

It has been adjudged that he is the agent of the defendant (*Matthews agt. The Mayor*, 1 Sand., 132; *Nash agt. The Mayor*, 4 *id.*, 1; *Glover agt. The Mayor, &c.*, 7 Hun, 232), and under the case of *The People agt. The Supervisors of Delaware* (21 How. Pr., 50, and the cases there cited), and upon principle, if the defendant is liable for the action or default of the public administrator in this instance, I should conclude that the judgment is evidence to establish the title to the money.

But the defendant is not liable for every thing done by a person holding the office of public administrator, although he professes to act as such.

The defendants are liable for all money the public administrator shall receive *according to law*, and for the faithful execution of his office.

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In right of his office he has, in certain cases, authority to collect and take charge of the goods, chattels, personal estate and debts of persons dying intestate.

That does not authorize him to take property which does not belong to an intestate. And the letters of administration, which he must in each case obtain, are evidence of his authority in "cases in which he was by law authorized to act" (*Revised Statutes*, vol. 2, p. 121, sec. 16).

For acts illegal or done outside of his office the defendants would not be liable. *Levin agt. Russell* (42 N. Y., 254) so holds.

In that case *Russell, the public administrator*, was sued, individually, for taking property of the plaintiff, as that of the intestate.

GROVER, J., says section 3 of the act (2d *Statutes at Large*, 123) prescribes the powers and duties of the public administrator and only authorizes him to take the goods of the intestate. "Section 42, page 131, making the corporation of the city liable for the application of all moneys received by the public administrator, according to law, and for the due and faithful execution of all the duties of office, confers no power upon him to seize and detain the goods of others in which the deceased had no interest. It follows that if the goods in question were, as claimed, the property of the plaintiff the action for detaining them from him was well brought against the defendant personally."

In that case it was urged, in defense of the public administrator, that he "acted in good faith, believing it was the property of the intestate at the time of his death."

Now, I apprehend, that if instead of prosecuting Russell, individually, he had been proceeded against in his character as public administrator and a judgment had gone against him, that the plaintiff, failing to collect from Russell, could not have succeeded against the municipal corporation, and that the judgment upon such a state of facts would not conclude it.

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Notwithstanding such judgment, it must have been held that the act was the individual act of Russell, for which the city corporation was not responsible.

Section 43 of the statute under consideration I have no idea was overlooked by the learned judge in *Levin agt. Russell*. That section provides that all persons aggrieved by any unauthorized act or omission of the public administrator shall have the same remedies against the corporation for the same as they would have against any executor.

I think it will appear, from an examination of the case, that the act of receiving the money and property in question was not wholly unauthorized by the parties in interest; but if otherwise, an executor would be liable individually, and not in his representative character, for property taken by him to the injury of others, which did not belong to the estate of the testator. And the facts appearing in the case under consideration lead to the conclusion, that the public administrator, personally, if any one, is liable for the moneys of Miss Bingham, and that the judgment roll is not evidence to fasten a liability upon the city corporation.

It appears, by the facts agreed upon, "that Richard S. Green died in the city of New York, in the month of March, 1870, leaving no will or next of kin. His friends came down from Troy to hunt up his property which, with the exception of some money which stood to his credit in the National Trust Company, was chiefly in the hands of certain persons who claimed an interest therein. Mr. Hubbell was employed as attorney for all the parties in interest, and his efforts led to the discovery of the property. He notified the public administrator of the death of Green and advised him that the property should be taken charge of, and also of the position of Heith and Newcombe (the claimants) in reference thereto." The administrator employed Mr. Hubbell in the premises, and he afterwards took the property and money in his possession. Mr. Hubbell testified that Miss Bingham came down with the others in quest of the property; that he represented

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all the parties in interest, and that the plaintiff himself aided in the discovery of the property.

There is no reason to question the good faith of the public administrator in taking possession of this property.

It does not appear that he was advised before he took possession that any part of the property or money belonged to Miss Bingham.

If they did so advise him, then his act in taking so much as belonged to Miss Bingham, was willful and the city corporation would not be liable.

If they did not interpose their claim at the time but allowed him to act in ignorance of the fact that he was illegally taking, as the property of the intestate, the property of Miss Bingham, then, I think, plaintiff should not hold the city corporation liable, for the public administrator, in such act, would not be the agent of the city corporation, but of those with and for whom he was acting.

It appears to me it was wholly unnecessary for the prosecution of Miss Bingham's rights to secure the intervention of the public administrator. Her own property she could as readily have secured from those in whose custody it was, as from the public administrator afterwards.

For these reasons I think the city corporation is not concluded by the judgment record against the public administrator, and that its liability must be determined by all the facts in the case, which I conclude to be adverse to the plaintiff's right to recover in this action.

But suppose I am wrong in this conclusion and the judgment be evidence, what does it determine and judge? It declares that the sum of \$6,080.59 collected and received by the public administrator as belonging to the estate of Richard S. Green, deceased, in fact and in law belonged to, and was the property of, the said Catharine M. Bingham, and did not, in fact or in law, belong to the estate of Richard S. Green, and it was ordered that out of the said sum of \$6,080.59 belonging to said Catharine M. Bingham, or so much thereof

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as is now in the hands of the defendant (the public administrator), the said defendant do pay to John Hubbell, Esq., the attorney for the plaintiff, the sum of \$235.75 for his costs as taxed, and five per cent upon the amount of the recovery, as an extra allowance in addition thereto, and that he pay to John Todd, counsel for the defendant, the sum of \$250 as an allowance to him in lieu of costs, and that the balance of said sum of \$6,080.59, or so much thereof as the defendant now has in his possession or under his control, be paid by him to the plaintiff.

The amount in the hands of the public administrator at the time of the recovery of this judgment, of the moneys and property received by him as and for the estate of Green, including the plaintiff's moneys, was the sum of \$4,452.44. The residue of the moneys and proceeds of property which had been received by him, had been expended in fees, costs and charges incident to the recovery of the property and the administration of the estate.

These charges in the aggregate amounted to nearly \$4,000. These expenses and charges embraced all the property acknowledged to be Green's, and \$1,628.15 of the moneys adjudged to belong to Miss Bingham.

These charges include the commissions of the public administrator, \$255.52, the residue was moneys actually disbursed by him.

The sum of these charges is large considering the amount of the estate, but it appears to have been afflicted with trouble and litigation from the beginning.

It is to be greatly regretted that the estates of decedents are subject to such burdens. But the correctness and legality of the disbursements and charges, have been approved by the surrogate and sanctioned by his order, and one or more of them by the order of this court.

I cannot, therefore, pass upon the propriety of these expenses.

One item is a judgment for costs amounting to \$623.22,

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in a suit brought by Miss Bingham against the public administrator, and which suit was dismissed for want of prosecution.

The propriety of the defense of that suit is shown by the facts, appearing upon the record, that the attorney for the plaintiff, on the hearing before the referee, assented to the motion dismissing the complaint.

Mr. Hubbell, the attorney for the plaintiff, was paid by the public administrator the sum of \$1,275 for his professional aid and services in and about discovering the property, and afterwards rendered, on the retainer of the administrator.

Deducting the sum total of these charges and disbursements, there remained in the hands of the public administrator, a balance applicable to the judgment sought to be enforced in this action, the aforesaid sum of \$4,452.44, and which amount he has fully paid over according to the express directions of the judgment.

This, I think, meets the exact demands of the judgment.

And for the reasons stated, I conclude that the plaintiff has no just or equitable claim or demand against the defendants in this action.

I can see no justice in calling upon the defendants to make up to the plaintiff the diminution of the moneys in question, expended in searches for the property and legal charges incident to the same, a considerable portion of which was paid to the attorney for Miss Bingham and the plaintiff, and for fees and charges imposed upon the administration, and in the defense of an action needlessly brought by her, and which was dismissed for want of prosecution, by the consent of her attorney and counsel.

The plaintiff's complaint must, therefore, be dismissed, but without costs.

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SUPREME COURT.

WALBRIDGE agt. JAMES.

Referees — amount they are entitled to demand and have on making sale of premises under a decree of foreclosure.

A referee appointed to sell in a foreclosure action is entitled to the same fees and percentage (commissions) as might be taxed for the same services had they been performed by the sheriff, not exceeding in the aggregate fifty dollars.

Where there were three sales of the mortgaged premises, all of which it appears were regularly made, the last one only having been consummated by the delivery of the deed, twenty-five per cent of the purchase-money being paid in on each of the first two sales, both of which fell through; on the third sale, the premises were struck off and sold for \$5,700 cash, and the title passed; the defendant took the benefit of the purchase, and had the benefit of the moneys paid in on the prior sales, he agreeing to pay and satisfy the referee's fees and expenses:

Held, that the referee was entitled to fifty dollars for the third and consummated sale, inasmuch as the taxable fees and percentage, or legal commissions on the sale alone would amount to the full sum of fifty dollars. He is not entitled to commissions on the first two sales. He can have commissions only on such moneys as were actually or constructively received and paid over under the decree. For making the two ineffectual sales, the referee is entitled to two dollars and fifty cents each, *i. e.*, for receiving and entering the decree in his book, fifty cents; advertising the property for sale, two dollars; in all fifty-five dollars (*Per* BOCKES, J.).

Where a resale is had on the failure of the purchaser to complete his purchase, the costs of the resale are properly to be deducted from the deposit (made by the purchaser). Therefore the referee could retain his fees (including commissions), from that deposit, in each of the sales not completed, and as the defendant was, by the agreement, to pay all the referee's fees, &c., he was liable for these (*Per* LEARNED, J.).

There was but one sale *made*; the others were not perfected, and the fees should be fifty dollars, as the extreme limit of the law of 1876 (*Per* BOARDMAN, J.).

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Third Department, General Term, November, 1878.

Before LEARNED, P. J., BOARDMAN and BOCKES, JJ.

BOCKES, J. — The question presented by this appeal is as to the amount which a referee is entitled to demand and have on making sale of premises under a decree of foreclosure.

In this case there were three sales of the mortgaged premises, all of which it appears were regularly made, the last one only having been consummated by the delivery of the deed. The causes which rendered the first two of them ineffectual it is useless here to state. Twenty-five per cent of the purchase-money was paid in on each of the first two sales, both of which, as above stated, fell through. On the third sale the premises were struck off and sold for \$5,700 cash and the title passed. It seems that Mr. James took the benefit of the purchase and, as is understood, had the benefit of the moneys paid in on the prior sales, he agreeing to pay and satisfy the referee's fees and expenses.

Briefly stated, the case stands the same as if Mr. James had been the purchaser at each sale with a liability to pay and satisfy the proper and legal expenses of those sales, that is, what in law the referee was entitled to demand and receive for conducting them.

No question is here made as to the allowance for disbursements. The learned judge at special term held that the referee was entitled to ten dollars fees and twenty dollars commissions on each sale, amounting to ninety dollars in all. These allowances are challenged by the appellant James, who insists that a sum not exceeding ten dollars in all was allowable. The special term held that the referee was entitled to the same fees and commissions as the sheriff would have been entitled to had he made the sale, to wit, a sum for fees not exceeding ten dollars (*Laws of 1847, chap. 280, sec. 77; 3 R. S., 222, sec. 93 [sixth edition]*), and commissions not exceeding twenty dollars in the aggregate (*Delevan agt. Payne, 8 Paige,*

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459), and that he was entitled to these allowances on each sale. It is probable that the attention of the special term was not called to the provision in the act of 1876 hereafter to be considered.

There is no statute declaring in terms the items allowed to a referee who makes a sale under a decree in foreclosure; but it has been decided at general term that, by analogy, his services being the same as those of a sheriff in the same class of cases, he should have the same fees, with the limitation as to gross amount declared by law. This was held in *Innes agt. Purcell* (2 N. Y. Sup. Ct. Rep. [T. & C.], 538). In this case judge DANIELS collated the provisions of the law then applicable to the question, and reached the conclusion, on a clear line of reasoning, that the measure of compensation for similar services by a sheriff and referee, in making a sale under a decree of foreclosure, was the same, and it was there decided that a referee was entitled to fees, to be taxed at the same rates as were allowed to a sheriff for performing the same services. With this conclusion we are satisfied. Then what fees would the sheriff have been entitled to had he performed the services here performed by the referee? Since the decision in the case of *Innes agt. Purcell* (*supra*) a new statute has been enacted bearing on the question under consideration (*Laws of 1876, chap. 431, sec. 11, making an amendment of sec. 309 of the Code of Procedure*). It is there provided that "no greater sum than fifty dollars shall be charged by, or allowed to, any sheriff, referee or other officer, for his fees, percentage or services, for any sale under a decree or judgment of foreclosure." This provision was in force when the sales in this case were had. Thus the limitation then and now stands at fifty dollars, instead of ten dollars fixed by the former statute, but it expressly covers both fees and percentage. Now, in the case in hand, the referee was entitled to the same fees and percentage (commissions) as might be taxed for the same services had they been performed by the sheriff,

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not exceeding in the aggregate fifty dollars. Thus it seems that in this case the referee was clearly entitled, according to the decision in *Innes* agt. *Purcell*, and under the limitation fixed by the act of 1876, above cited, to fifty dollars for the third and consummated sale, inasmuch as the taxable fees and percentage or legal commissions on that sale alone would amount to the full sum of fifty dollars. But we are of the opinion that he can have commissions only on the consummated sale. He can have commissions only on such moneys as were actually or constructively received and paid over under the decree. The sum thus made from the sale is deemed to be the sum collected, and it is on that sum that his right to commissions attach. The twenty-five per cent paid in on the first two sales became, in this case, part of the \$5,700 ultimately paid on the consummated sale. This latter sum was all that was ever made under the decree. The fact that one referee was substituted for another during the progress of executing the decree in this case, does not at all affect the question before us. There were, however, services performed by the referee on those first two sales for which he was entitled to compensation, the same as if he had been sheriff. It is supposed he was in effect as regards fees and commissions performing the duties of the sheriff in executing a judgment. Then let us suppose that instead of a decree of sale, he had held, as sheriff, an execution, and had performed the services thereunder which were performed in making the two ineffectual sales, what were the items of service for which the law would allow him compensation? Those fees would have been as follows: For receiving and entering the decree in his book, in analogy to entering an execution, fifty cents; advertising the property for sale, two dollars. Perhaps there may be some other item or items of fees given by some statute, which has escaped our observation. Mileage is not allowable, for there is no such service to be performed in the class of cases under consideration. Nor can any allowance be here

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made for a report of sale on either of the two ineffectual sales on the hypothesis that the report of sale takes the place of a sheriff's certificate of sale, for no report of sale was made on either of those sales, nor for a deed to the purchaser, for no deed was given until given pursuant to the last and consummated sale. Besides, the provision as to the sheriff is that the fee for the deed is to be paid by the grantee. Thus, it seems, there is the sum of two dollars and fifty cents allowable against Mr. James on each of the two ineffectual sales, inasmuch as these fees were for services actually rendered, for which, under the circumstances of the case, he became liable. Then, it seems, the referee in this case was entitled to fifty-five dollars, and the order of the special term should be modified accordingly. But neither party should have costs either at special term or on the appeal. It should be here added, perhaps, that the decision in *Richards* agt. *Richards* (21 *Sup. Ct. Rep.* [14 *Hun*], 25) is made, with reference to the special statute, applicable to the city and county of New York.

Order of special term modified so as to make the allowance to the referee fifty-five dollars, but without costs of the special term or of the appeal.

LEARNED, *P. J.*—Where a resale is had on the failure of the purchaser to complete his purchase, I suppose the costs of the resale are properly to be deducted from the deposit made by the purchaser. Therefore the referee could retain his fees (including commissions) from that deposit in each of the sales not completed. As the defendant was, by the agreement, to pay all the referee's fees, &c., I think he was liable for these, as I assume that the referee did not deduct them from the amount of the deposits made on the sales.

BOARDMAN, *J.*—I think there was but one sale *made*; the others were not perfected, and that the fees should be fifty dollars as the extreme limit of the laws of 1876.

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N. Y. COMMON PLEAS.

In the Matter of DANIEL H. FITZGERALD.

Arrest — Imprisoned judgment debtor — application for discharge under article 6, title 1, chapter 5, part 2, Revised Statutes — Assignment in bankruptcy a bar.

An application by an imprisoned judgment debtor for his discharge, under article 6, title 1, chapter 5, part 2, Revised Statutes, will be denied, where it appears that a few days after his arrest he was adjudged a bankrupt, on his own petition. Such party cannot put it out of his power to obey the orders of the state court, and then ask that court to discharge him from imprisonment.

But if it should appear that, without any fault on his part and against his will, all the property which he had at the time of his arrest had been taken away from him, whilst imprisoned, the court would not refuse him a discharge.

Special Term, December, 1878.

VAN HOESSEN J. — Fitzgerald was arrested on the 21st day of August, 1878, upon an execution against his person, issued on a judgment against him, recovered by H. K. & F. B. Thurber. On the thirtieth day of August he was adjudicated a bankrupt, on his own petition, and, on the eighth day of November last, he presented to this court a petition praying for his discharge, under section 6, title 1, chapter 5, part 2, Revised Statutes. His application for the discharge is opposed by the Thurbers, who insist that, as he has made an assignment to the assignee in bankruptcy of all the non-exempt property he had at the time of his arrest, he cannot possibly comply with the state law, which requires that, in order to be discharged from arrest, he shall assign that very

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property for their exclusive benefit. Under the state law the Thurbers, who caused his arrest in their action, are entitled to be paid in full out of his property, if there be sufficient for that purpose; but, since he made his assignment in bankruptcy, he has no property which he can turn over to any assignee appointed by this court.

It is idle, therefore, for him to ask from a state court relief which it has no power to give, except upon his making an assignment of property which has passed irrevocably beyond his control. It is true that if it should appear that, without any fault on his part, and against his will, all the property, which he had at the time of his arrest, had been taken away from him whilst imprisoned, the court would not refuse him a discharge. But he is in no such situation. His property was assigned by him of his own free will, with a view to his own personal advantage. It was assigned in a lawful manner, and in conformity with the bankruptcy act; but, by his going into bankruptcy, there was an election on his part to get the benefit of a discharge from his debts in bankruptcy, instead of a discharge from imprisonment in the action between himself and the Thurbers. Having made that election, he can only get such relief as the bankruptcy courts can afford him. He cannot put it out of his power to obey the orders of the state court, and then ask that court to discharge him from imprisonment. It is his own act that has made it impossible for him to execute an assignment that will be any thing more than a nugatory formality. In *Dinkerhoff* agt. *Ahlborn* (2 *Abbott's New Cases*, p. 73), *Ahlborn*, an imprisoned judgment debtor, who, after his arrest under an execution from a state court, was adjudicated a bankrupt, found it necessary to obtain from the United States court an order annulling the adjudication of bankruptcy, for the purpose of obtaining his discharge from imprisonment. The same course is open to Fitzgerald, though he is, of course, at liberty to continue his proceedings in bankruptcy, and to obtain such relief as a discharge in bank-

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ruptcy will afford him. The case of *Maas* agt. *O'Brien* (14 *Hun*, 95) goes far to support the position that the state court should not entertain such proceedings as these, after an imprisoned debtor has resorted to the United States courts. There is an irreconcilable conflict between the federal system of bankruptcy and the state insolvent laws, and the latter are compelled to yield. Where the federal courts lay their hands upon the property of an insolvent, it is impossible for the state courts to carry the insolvent laws into execution. It is folly for a state court to attempt to execute a part of the provisions of the state statutes, after a limited state's court has taken under its exclusive control the insolvent's estate, and thus prevented the carrying out of other provisions of the statute which are essential to the completeness of the system. The views I have expressed are not novel. They are in full accord with the decision in *The People ex rel. Gilsten* agt. *Brooks* (40 *How. Pr.*, 165).

The application for a discharge is denied.

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SUPREME COURT.

ALEXANDER STEWART *et al.* agt. GEORGE MUNROE *et al.**Partition of lands — what the complaint should contain.*

In an action for the partition of lands where the complaint failed to state in explicit terms that the plaintiffs, who claimed title to the land as the heirs at law of a decedent in possession, were themselves in possession of their shares, or held the premises as joint tenants or as tenants in common with others:

Held, upon demurrer, that the complaint was insufficient.

A complaint in an action for partition should conform, in its statements, to what was required to be set forth in a petition for partition under the Revised Statutes (1 *R. S.*, p. 818, *sec.* 5).

The statutes require that the "rights and titles" of the plaintiff should be set forth.

Rights and titles under the statute considered.

Where one seeks to avail himself of a remedial statute he should, in pleading, bring himself within its terms by clear, distinct, affirmative allegations.

Special Term, October, 1878.

DEMURRER to complaint.

This action is brought for the partition of the lands of Alexander T. Stewart, deceased. The complaint states that the decedent died on the 10th day of April, 1876, intestate, seized and possessed of certain real estate in the state of New York, which is described; that the decedent left him surviving neither father, mother, brother or sisters, or descendant of any or either of them, but that he had collateral relatives, children and descendants of the deceased children of the brothers and sisters of his father and mother, whose names and degree of relationship to the decedent are stated, all of whom are made parties to the action either as plaintiffs or defendants.

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The plaintiff, Alexander Stewart, claims that he together with certain of the defendants are together entitled to one-sixth interest which descended through their father, John Stewart, and are each entitled to a twenty-fourth interest in the lands.

That the plaintiff, Ann Jane Bailey and certain of the defendants, are together entitled to a like one-sixth which descended through their mother, and are each entitled to a thirtieth interest in the lands. The fractional interests of other defendants, descendants of the brothers or sisters of the father or mother of the decedent, are stated.

That the several shares are subject, however, to the dower right of the defendant, Cornelia Stewart, the widow of the decedent. That the defendant George Munroe, and other persons, named as defendants, have or claim to have, some claim upon, or interest in a portion of the premises, which claim or interest the plaintiffs allege is subservient, and inferior to the right and title of the heirs at law of the decedent, designated in the complaint. That no person, other than those mentioned in the complaint, has any estate or share in the lands. That the parties to this suit, own no other lands in common, in this state; that all the parties to the action are of full age.

The defendant Munroe, demurs to the complaint, and assigns as the grounds of his demurrer, that the court has no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action.

Alexander & Green attorneys and *Ashbel Green* of counsel for defendant Munroe.

T. F. Kneeland, attorney and counsel for plaintiff.

VAN VORST, J.—To justify an action for partition of lands, the same must be held, and be in the possession of several persons, as joint tenants, or tenants in common (1 R. S., p. 317, *sec.*, 1; *Codé*, *sec.*, 448). *Clapp* agt. *Bromagham* (9 *Cowen*, 530) decides that the plaintiff must show a present actual possession; and ALLEN J., in *Sullivan* agt. *Sullivan* (66

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N. Y., 37), in speaking of the statute, says "the revisers did not intend to relax the rule, which they regarded as established, and were of the opinion, that the policy of the statute would be promoted, by requiring that the petitioners should be actually in possession of some part of the premises." He afterwards states, however, that the most liberal interpretation required "at least a constructive possession," in the individual seeking to avail himself of the act.

In order, therefore, to maintain the action, the person asking for partition must not only have a present estate in the land, as a joint tenant or tenant in common with others, but he must be in the actual or constructive possession of his individual share or interest (*Therasson* agt. *White*, 52 *How. P. R.*, 62, and the cases there cited).

The complaint, in this case, fails to state, in explicit terms, that the plaintiffs are in possession of their shares, or that they hold the premises, either as joint tenants, or as tenants in common, with others. I do not regard the statement in the complaint "that the parties to the suit own no other lands in common in this state" as a positive allegation that the lands in question are so held. A negation as to other lands being held in common, is no affirmation as to the character of the holding of the lands in question.

The plaintiffs' counsel, however, contends that it was sufficient to give the court jurisdiction, to allege the seisin and possession of the decedent, of whom the plaintiffs, and some of the defendants, are collateral relatives and heirs at law.

Under *Clapp* agt. *Bromagham* (*supra*, p. 550) such averment is clearly insufficient. But that case, as already observed, holds that there must be a present actual possession, which conclusion, subsequent decisions have modified to the extent of holding that constructive possession answers the statute; but the Revised Statutes require that the petitioner for partition should "set forth the *rights* and *titles* of all persons interested (1 *R. S.*, p. 318, *sec. 5*), and a complaint, in an action under the Code, should, doubtless, in this regard con-

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form in its statements to what was required to be set forth in a petition for partition under the statute (*Moak's Van Santvoord's Pleading*, p. 235). The statute, therefore, requires that the "rights" as well as the "titles" should be set forth.

The pleader in this case stops with an assertion of the "titles" of the parties in interest. It is true that "rights" and titles are, in some respects, synonymous, yet there is a distinction. The possession of land, actual or constructive, are rights. Rights in this connection originate in, and are modified by, the quality of the title. To constitute a perfect title there must be the union of actual possession, the right of possession and the right of property (2 *Black's Com.*, 199). These several rights may exist in several persons. In a completed title they are consolidated in one right existing in the same party (*Kent's Com.*, vol. IV, 393).

When one seeks to avail himself of the provisions of a remedial statute he should, in pleading, bring himself within its terms by clear, distinct, affirmative allegations.

This is obviously so with respect to the statute in question, when the holding of land, unaccompanied by possession, confers no right to maintain an action for partition. The action for partition of lands is not intended for the recovery of lands held adversely. A subsisting adverse possession is an absolute bar to the action (*Florence agt. Hopkins*, 46 *N. Y.*, 182).

While the pleader is not called upon to aver in his complaint that the lands are not held adversely, for adverse possession is to be interposed as a defense (*Burhans agt. Burhans*, 2 *Barb. Chy.*, 398), still I think that by appropriate terms, in addition to setting up his title, he should allege his possession to show that a remedy by partition is proper. This should not be left to inference from facts pleaded. In *Jenkins agt. Van Schaick* (3 *Paige*, 245) the chancellor said: "It is not necessary to aver in the bill that the plaintiff is in possession of the premises, as that will be presumed from the allegation that the parties are *seized in common*." The distinctive feature of a tenancy in common is unity of possession.

Stewart *et al.* agt. Munroe *et al.*

"A possession is something more than a mere right or title, whether to a *present* or future estate. It implies a right to deal with the property at pleasure, and to exclude others from meddling with it" (*Sullivan agt. Sullivan, supra*).

Beebe agt. Griffing (14 *N. Y.*, 235) is cited by the plaintiffs' counsel as holding differently. That case speaks of the evidence on the trial. We are now dealing with the plaintiffs' pleading, which is to be tested by the statute.

In *Beebe agt. Griffing* it will be seen that the *petition* stated that the petitioners "are in possession of the lands described as tenants in common," and as far as my observations extend, practice and precedent sanction the use of such words uniformly (*Barb. Chy. P.*, vol. 3, p. 852; *Hoff. Chy. P.*, vol. 3, p. C. C. L. *xxii*; *Wait's Prac.*, vol. 5, subject, *Partition*, pp. 61, 63).

I think it best, in every light in which the subject is viewed, that the precedents should be adhered to, and that the plaintiffs should be obliged to set up their possession, if they can do so, in such form as to give the court jurisdiction to award partition.

There should be judgment for the defendant on the demurrer with liberty to the plaintiff to amend on payment of costs.

NOTE. — It will be observed from the complaint, that this action is not brought under chapter 238, of the Laws of New York, "relative to *disputed wills*." By section two of that action, the heir, claiming lands by descent from an ancestor, who died holding and being in possession of the same, *whether the heir be in possession or not*, may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and any possession held under same, provided that such heir shall allege and establish in the same action, that such devise is void. The complaint in the above action contains no allusion to the fact that Mr. Stewart left a will, on the other hand it alleges that he died "*intestate*." And yet it is well known that Mr. Stewart did not die "*intestate*," The records of this court show it (*Bailey agt. Hilton*, 14 *Hun*, 3). This fact is alluded to, in the opinion lately delivered by WESTBROOK, J., in a motion to substitute another attorney in the place of the one who brought this action (*see post*, p. 256). [REP.]

Gates agt. Buddensieck.

N. Y. COMMON PLEAS.

GATES agt. BUDDENSIECK and BELLMANN.

Mechanic's lien — within what time a lien must be filed — Answer — Demurrer.

A lien, by one who furnishes materials toward the erection, alteration or repair of a building in the city of New York, *must* be filed within *thirty* days after the materials are furnished or supplied.

Special Term, October, 1878.

DEMURREE to answer.

J. F. DALY, *J.* — The action was brought to foreclose a mechanic's lien in the city of New York, and the question now to be determined is within what time a lien must be filed by one who furnishes materials towards the erection, alteration or repair of a building in this city; whether it must be filed within thirty days after the materials are furnished, or whether it may be filed within thirty days after the completion of the building, improvement, structure, repairs or alterations in which the materials were used.

The plaintiff furnished materials between the 12th of October, and the 8th of November, 1877, to one Buddensieck, who used them in the erection of buildings, under a contract with one Bellmann, the owner. Plaintiff did not file his lien notice until March 18, 1878, one hundred and thirty days after the materials were furnished, but before the expiration of thirty days after the buildings were completed under Buddensieck's contract. The owner sets up as a defense that the lien was not filed within thirty days after the materials were furnished. Plaintiff demurs to this defense.

The act of 1875 (*chap.* 379) prescribes the time within

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which lien notices must be filed. In section 5 it is enacted that every original contractor within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this act, must, *within thirty days after* the completion of any building, improvement or structure, or after the completion of the alteration, or repair thereof, or after the completion of the work, *or the furnishing of the materials*, for which the lien is claimed, file with the county clerk, &c.

The language used does not leave the question free from doubt, but I deem the proper construction to require the lien of a person furnishing materials to be filed within thirty days after the materials are supplied.

Special reference to, and provision for, the claims of persons furnishing materials is made in the section, indicating the intention to enact particularly in that clause upon the subject of their claims. The limitation of thirty days after the furnishing of the materials, is special as is the limitation as to other claims. The section provides for liens under eight different species of claims.

I. By the original contractor who has sixty days after the completion of his contract to file his notice.

II. By one claiming a lien for the completion of a building.

III. By one claiming a lien for the completion of an improvement.

IV. One claiming for the completion of a structure.

V. One claiming for the completion of alterations.

VI. One claiming for the completion of repairs.

VII. One claiming for work completed by him (evidently intended to cover the claims of an individual mechanic or laborer who has not been paid for his work).

VIII. One claiming for materials furnished by him, *and* in each of the last seven cases, the lien must be filed within thirty days after the completion of the building, improvement, structure, alteration, repair, work, or the furnishing of the materials, as the case may be.

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To give the section the construction claimed by plaintiff, it would be necessary to hold that the legislature fixed *two* imperative limitations, *one within the other*, for the filing of liens by subcontractors, *i. e.*, that the person furnishing materials must, within thirty days after the materials are furnished, *or* must, within thirty days after the completion of the building, improvement, structure, alteration, repair, or work in the course of which the materials were used, file his notice. The latter being the greater limitation includes, of course, the former and renders the former unnecessary; but we may not conclude that the legislature made an unnecessary, inconsistent or idle provision, if any construction shows the provision to be reasonable and proper.

That the limitation contended for by defendants is reasonable and proper, one illustration will clearly show: Suppose one furnishes stone to the original contractor for the construction of the foundation of a building, which building is not to be, or cannot be, completed for years. Has the claimant, who furnished the foundation stone, until thirty days after the building is finished in which to file his lien, even if his claim against the contractor is outlawed by time? If he have, then the statute is meaningless and the provision idle that *requires* him to file it within thirty days after the materials are furnished.

A decision in the courts of another state support, however, the construction of the act claimed by plaintiff, and must be examined. The mechanic's lien law of the city of Baltimore (*Laws of Maryland*, 1838, *chap.* 205, *sec.* 1) provides that every building erected in the city shall be subject to a lien for the payment of all debts contracted "for work done or materials furnished" for or about the erection or construction of the same; and further (*sec.* 13) provides that every such debt shall be a lien as aforesaid until the expiration of six months "after the work shall have been finished or materials furnished," etc. In the case of *The Okisko Co. agt. Matthews* (3 *Md.*, 176), it was held that the lienor was entitled to the

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benefit of the two alternatives, *i. e.*, that his lien was good *either* for six months after the materials were furnished, or after the work was finished, in the course of which the materials were so furnished.

I should have supposed, from a reading of the statute, that the legislature intended to provide for two classes of debts, one for materials and one for work, and to have designed that if the lien was for the former, it was to continue for six months after the furnishing of the materials, and if the latter, then for six months after the doing of the work. Such is the interpretation which the language of a nearly similar provision in the Kings county, New York, mechanic's lien act of 1853 (*chap.* 335) has received from our court of appeals. The last-named act provided that the notice of claim must be filed before the expiration of "thirty days after the completion of the work or within sixty days after the materials are furnished," and the court held (*Spencer agt. Barnett*, 35 *N. Y.*, 94-96) that, in the case of a claim for materials, the notice must be filed within sixty days from the date of furnishing them. No suggestion was made that the material man had any "alternative" between the limitations in the statute.

The demurrer should be overruled, with costs.

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U. S. CIRCUIT COURT.

FRANCISCO J. MONTEJO and another agt. THOMAS J. OWENS
and others.

*Action upon a judgment—Equitable defenses not available in United States
circuit court—Answer—Demurrer.*

In a suit upon a judgment brought in a court of record of the state of New York, an equitable defense would be available by way of answer, if sufficient in substance to entitle the party to relief against the judgment.

But in the circuit court of the United States equitable defenses are not now available in common law actions.

Where the action is at common law and the defense is substantially an action in equity, it cannot, because it assumes the guise of an answer or defense under the state law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights.

The jurisprudence of the United States has recognized the distinction between legal and equitable rights and suits as one of substance, as well as of form and procedure.

Southern District of New York, September, 1877.

THIS case comes up on demurrer interposed by the plaintiffs to the defendants' answer. The action is brought on a judgment recovered by the former against the latter in the city of New Orleans. The present action was commenced by a *capias* in this court claiming \$16,130.16 with interest. The complaint sets up as its cause of action, the recovery of the New Orleans judgment. The defendants do not deny the recovery of the judgment or attempt to plead payment or satisfaction, but attempt to impeach the judgment by an answer setting forth matters which are not defenses at com-

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mon law against the judgment, but which are claimed to give the defendants an equitable right to prevent the enforcement of the judgment.

Granville P. Hawes, for plaintiff. The defendants cannot set up an equitable defense in an action at law in this court. The fundamental and structural distinction between the powers of courts of law and equity preserved by the Constitution of the United States has always been recognized in this court. This court, sitting as a court of law, has no jurisdiction to administer equitable relief, and it can make no difference whether the relief is sought affirmatively by plaintiff or invoked by a defendant. An equitable claim, however strong it may be, cannot be set up at law to defeat the legal title (*Lessee of Baird* agt. *Wolf*, 4 *McLern*, 552). A reference to the legislation and decisions previous to the act of 1872 not only sustains this position but determines the construction of that act. To effectuate the purposes of the legislature from 1789 down to 1818 the remedies in the courts of the United States are to be at common law or equity, *not according to the practice of state courts* but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles (*Robinson* agt. *Campbell*, 3 *Wheat.*, 212; *Loring* agt. *Donner*, *McA.*, 360; *Jones* agt. *McMaster*, 20 *How.*, 22; *Bennett* agt. *Butterworth*, 11 *id.*, 666; *Thompson* agt. *Railroad Companies*, 6 *Wall.*, 134; *McFaul* agt. *Ramsey*, 20 *How.*, 526; *Myers* agt. *Grier*, *McA.*, 401, 402; *Fenn* agt. *Holme*, 21 *How.*, 481). It must be conceded on these authorities that previous to the act of 1872 the defense set up in this action would be a nullity in a common-law court. The act of 1872 has not changed this rule; and this is apparent both from the words of the statute and from the purpose which called for its passage (*R. S. [U. S.]*, section 914). That the statute has not extended the jurisdiction of common-law courts or attempted to abolish the distinction between legal

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and equitable remedies, but refers only to the technical forms of procedure, is apparent from the cases which have been decided under it (1 *Abb. [U. S.] Prac.*, p. 249; *Republic Ins. Co. agt. Williams*, 3 *Bis.*, 371; *Blease agt. Garlington*, 2 *Otto*, 1, 8).

Coudert Brothers, for defendants. *F. R. Coudert*, of counsel. Such an answer as this, in precisely such a case as this, is a good answer under the decisions of the highest courts in this state (*Dobson agt. Pearce*, 12 *N. Y.*, 156; *Reigal agt. Wood*, 1 *J. C. R.*, 402; *McDonald agt. Neilson*, 2 *Cono. Rep.*, 139; *Duncan agt. Lyon*, 3 *J. C. R.*, 351; *Marine Ins. Co. of Alexandria agt. Hodgson*, 6 *Cranch*, 206; *Shottenkirk agt. Wheeler*, 3 *J. C. R.*, 275). This being an action at law the act of 1872 applies; and as the pleading in question would be a proper pleading in "a like case" in the supreme court of this state, it is also a proper pleading in this court.

JOHNSON, *J.*—This case comes up on a demurrer by the plaintiffs to the answer of the defendants.

The action is upon a judgment rendered by the circuit court of the United States for the district of Louisiana in favor of the present plaintiffs against the present defendants.

The answer sets up a variety of matters which are not defenses at common law against the judgment, but which are claimed to give the defendants an equitable right to prevent the enforcement of the judgment.

These matters the defendants insist are available to them as a defense in this suit by force of section 914 of the Revised Statutes of the United States.

That section prescribes that "the practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which

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such circuit or district courts are held, any rule of courts to the contrary notwithstanding."

It must be assumed that in a suit upon a judgment brought in a court of the state of New York the defense set up in the answer in this suit, would be available by way of answer if sufficient in substance to entitle the party to relief against the judgment. Such is the known and established law of procedure in the state of New York, introduced by sections 69, 150 and 167 of its Code of Procedure. The first of these abolishes the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing and declares that thereafter there shall be in that state but one form of action. The next section cited enacts that the defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as had been theretofore denominated legal or equitable or both.

The last section named enacts that the plaintiffs may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable or both, under certain specified conditions.

These sections of the Code deal with claims legal and equitable, and defenses legal and equitable set up by answer and counter-claims of both characters.

In pursuance of the policy thus indicated, section 274 provides that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. It is of course obvious that this system, while it undertakes to provide for the means of administering indiscriminately legal and equitable remedies in substance founded upon legal and equitable rights, completely ignores all the former schemes of procedure founded on the recognition of their differences.

Now, from the provisions of section 914 of the United

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States Revised Statutes, which is already set forth, equity and admiralty causes are completely excluded in terms. That section does not relate to them except to effect such exclusion. The jurisprudence of the United States has recognized this distinction in numerous cases, as one of substance as well as of form and procedure (*Robinson agt. Campbell*, 3 *Johnston*, 212; *Bennett agt. Butterworth*, 11 *Howard*, 669; *McFaul agt. Ramsey*, 20 *id.*, 526; *Jones agt. Howard*, *id.*, 22; *Fenn agt. Holme*, 21 *id.*, 481; *Thompson agt. Railroad Co.*, 6 *Wallace*, 134). In the last case cited Mr. justice DAVIS says, giving the opinion of the court, "the Constitution of the United States and the acts of congress recognize and establish the distinction between law and equity.

"The remedies in the courts of the United States are at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit." In the case of *Bennett agt. Butterworth*, above cited, chief-justice TANEY said, "The Constitution of the United States in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state courts. But if the claim is an equitable one he must proceed according to the rules which this court has prescribed regulating proceedings in equity in the courts of the United States." That these discriminations between legal and equitable rights and suits are substantial in the jurisprudence of the United States, is further apparent from provisions of the statute

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law, as well as from the decision of the courts. Under section 721 of the Revised Statutes the laws of the several states with certain exceptions, must be regarded as rules or decisions in trials at common law in the courts of the United States, in cases where they apply, while, on the other hand, the law of equity in the courts of the United States is one and the same in every state, not dependent upon local law.

"Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States and for the supreme court as the last resort to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable thereto" (*Neves* agt. *Scott*, 13 *How.*, 270). Nor are the statutes silent as to the forms and modes of procedure in suits of equity. Section 913 of the Revised Statutes declares that they shall be according to the principles, rules and usages which belong to courts of equity, except as modified by statute or rules made in pursuance of statute or by the supreme court.

That court has accordingly prescribed a body of rules regulating very largely and comprehensively the practice in equity.

It is claimed that, inasmuch as the present action is one to enforce a judgment, and therefore not an equity cause, the procedure is to be conformed to that of the state courts upon such a cause of action; and that, as those courts allow an equitable right to set aside or restrain the execution of such a judgment by way of answer, the courts of the United States must conform to that rule.

But this is a mere confusion of names. This so-called defense is an affirmative equitable right to the relief asked. It, under the cases and statutes cited, is to be admitted under the equitable principles, and according to the equitable procedure of the courts of the United States. In that respect the procedure cannot be conformed to the state practice with-

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but overthrowing the whole scheme for the administration of equity in the courts of the United States. The action is at common law; the defense is substantially an action in equity, and it cannot, because it assumes the guise of an answer or defense under the statute law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights.

The demurrer must be sustained, and judgment given for the plaintiff, with leave to defendants to amend on payment of costs within twenty days.

Lalor agt. Dunning.

N. Y. COMMON PLEAS.

JOHN LALOR agt. FANNY G. DUNNING and others.

Removal of cause to United States court—proper case—what petition must set forth—decision of motion not res adjudicata.

To entitle a party to the removal of a cause from a state court to a United States court it is not sufficient for the petitioner to state in his petition that it is a proper case for removal, but the *facts* showing that the case is a proper one to remove under the law must be set forth.

Where, though the order for removal was obtained at special term, it was obtained *ex parte* the plaintiff should not be driven to appeal but should be permitted to apply to the special term for its vacation.

The decision of a motion is never *res adjudicata*.

Special Term, December, 1878.

THE action is brought to foreclose a purchase-money mortgage on property on One Hundred and Fourteenth street, New York city, and all the parties to it are residents and citizens of New York state. The defendant Wiley made the mortgage to plaintiff and subsequently conveyed the property to Fanny G. Dunning, subject to the mortgage. All the defendants are in default except Fanny G. Dunning, and the only relief asked for in the complaint against her is to bar her claim to the property. She, however, presented to judge LARREMORE a bond and petition for removal of cause to the United States circuit court, claiming that the cause arose under the laws of the United States, and the ground stated was, that an escheat of the premises in question had accrued before the property was conveyed by plaintiff, it having once been owned by a national bank, and that by reason of such escheat there is a

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failure of plaintiff's warranty in his deed to Wiley; and that plaintiff's warranty having been assigned to defendant Dunning she claims to offset damages for the breach of warranty against plaintiff's mortgage, and that the decision of the cause will require a construction of United States laws. On these facts an order was made, *ex parte*, removing the cause.

Early & Shaw, for plaintiff.

Moore & Davidson, for defendant Fanny G. Dunning.

VAN HOESEN, J.—It was unnecessary for the special term of this court to make any order for the removal of this cause to the United States circuit court. All that section 3 of chapter 3, 18 United States Statutes at large (*act of congress of 1875*) requires is, that the state court shall accept the bond, and the petition of the party seeking to transfer the action from the state to the federal court. The state court may, however, pass, in the first instance, upon the sufficiency of the bond and the sureties, and may also determine whether the facts exist which entitle a suitor to a removal of the cause. No provision is contained in the act as to what the petition must set forth, but nevertheless it must be made to appear, either by the petition or by other evidence, that the case falls within some one of the subdivisions of section 2 of the act in question (*Clark agt. Opdyke*, 10 *Hun*, 383.) In this case, the petition refers to certain allegations of the defendants' answer, but that pleading is not one of the papers in which application was made, nor was it used on the argument of this motion. The petition alone is before me, and by that I am to determine whether the order for the removal of the cause should be vacated. Though the order for removal was made at special term, it was obtained *ex parte*, and there is no impropriety, therefore, in my considering whether it should stand. The decision of a motion is never *res adjudicata* (*Smith agt. Spalding*, 3 *Rob.*, 615; *Belmont agt. Erie R. W. Co.*,

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52 Barb., 637; 4 *Wait's Practice*, p. 612, *subd.*, b.), and as the order of removal was obtained without notice, I think the plaintiff should not be driven to appeal, but should be permitted to apply to the special term for its vacation. It appears that this action is for the foreclosure of a mortgage, executed by George W. Wiley to the plaintiff, upon land situated in the city of New York. Judgment for the deficiency, if any there shall be after the foreclosure sale, is demanded against Wiley only. The petitioner, Mrs. Dunning, is made a defendant, and it is alleged that she has, or claims to have, some interest in the mortgaged premises. The only relief sought against her is that she be barred and foreclosed from all right in the property, and from all claim to redeem the same. The petition alleges that the suit arises under the laws of the United States, because "the defense partially rests upon an escheat of certain lands, tenements and hereditaments." What lands, &c., are here referred to, there is nothing to show, but I suspect the lands meant are those covered by the mortgage in suit. The petition then proceeds to allege that "the escheat arose, was caused, or if not caused, was continued and not cured, by the taking, owning, holding, purchasing, selling, bargaining, conveying, granting or assigning of said lands, tenements and hereditaments by a national bank, and in that the question arises as to the operative effect of sections 5136, 5137, 5154 and 5155 of the Revised Statutes of the United States, and the acts amendatory thereof, and as to what manner real property, acquired by a national bank, is taken and held by it."

Now, it is manifest that upon the foregoing allegations no court can say that this suit arose under the laws of the United States. It originated in the neglect of Mr. Wiley to pay the interest on a mortgage which he executed to the plaintiff. Mrs. Dunning, the petitioner, is made a party because she has, or claims to have, some interest in the premises; if she acquired that interest under any law of the United States, she has not so stated to the court. Not one fact is alleged

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from which it can be inferred that her defense rests upon a construction of any law of the United States. The most that is said is, that the defense rests partly upon an escheat. How the escheat was effected, does not appear. The allegation that it came about through some act of a "national bank in taking, owning, holding, purchasing, selling, bargaining, conveying, granting or assigning certain lands," is too vague and uncertain to be regarded as the averment of a fact. Nor is it aided by the expression of the petitioner's opinion that a question will arise as to the construction of sections 5136, 5137, 5154 and 5155 of the Revised Statutes. The supreme court of the United States, in construing the act under which the application for the removal of this cause was made, has decided that the *facts* must be stated which show the petitioner to be entitled to the removal. In *Little York Goldwashing Co. agt. Keyes* (6 *Weekly Digest*, p. 100), that court said, that a cause could not be removed from a state court simply because, in the progress of the litigation, it became necessary to give a construction to the Constitution or laws of the United States, but that the *decision* of the suit must depend on such construction. It was further said, that the suit must arise out of a controversy in regard to the operation and effect of the laws involved, and that it was the duty of the circuit court to remand the cause to the state court unless it appeared that the rights of the parties depended upon the decision of such a controversy. Tried by this test, the petitioner's application is fatally defective. If I thought that in any view the petition could be considered sufficient, the plaintiff would be left to his application to the United States circuit court for an order remanding the cause to this court, but it seems to me so utterly lacking in averments necessary to give the circuit court jurisdiction that I shall vacate the order which accepted the bond and the petition, and directed the removal of the cause. If the circuit court should deem the petition sufficient, it may issue its mandate staying proceedings in the common pleas (*Bell agt. Dix*, 49 *N. Y.*, 232).

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In any event, the defendant cannot suffer; she may set up in her answer the proceedings she has taken to procure a removal of the action, and if it should be determined that her petition is regular and valid, she will obtain from this court a judgment declaring null and void every step taken in the common pleas subsequently to the presentation of her bond and petition to my predecessor at special term (*Shaft agt. Phoenix Life Ins. Co.*, 67 N. Y. 544).

The plaintiff's motion is granted.

Mayer *et al.* agt. Noll *et al.*

SUPREME COURT.

SALLY J. MAYER *et al.* agt. JOHN G. NOLL *et al.*

*Examination of parties before trial—on whom order for, must be served—
Code of Civil Procedure, sections 870–873.*

An order for the examination of an adverse party as a witness before the trial of the action, under sections 870–873 of the Code of Civil Procedure, must be served upon the party to be examined as well as upon his attorney. Service upon the attorney alone will not authorize an attachment against the party, nor an order striking out his pleading.

General Term, First Department, November, 1878.

ON the 13th of May, 1878, the plaintiffs obtained an order, under sections 870–873 of the Code of Civil Procedure, for the examination of the defendants as witnesses before the trial of the action. The order directed that service be made upon the parties to be examined or upon their attorney. Service was made upon the attorney alone. The defendants, who resided at Fort Wayne, Indiana, failed to appear for examination at the appointed time and place. The plaintiffs, thereupon, applied for an order striking out the defendants' answer as a punishment for their failure to appear. Upon the argument, which was had at special term before DANIELS, J., the defendants' counsel objected, that the service of the order for examination was incomplete and that it should have been served upon the parties to be examined as well as upon their attorney, as had been held in *Riddle agt. Cram* (5 *Weekly Dig.*, 277). The objection was overruled and the defendants' answer was stricken out, unless within five days the defend-

Mayer *et al.* agt. Noll *et al.*

ants consented to appear and submit to an examination under the original order theretofore made. The defendants declined to give such consent and appealed.

John E. Brodsky, for appellant, cited and relied upon *Riddle agt. Cram* (5 *Weekly Digest*, 277).

Ira Leo Bamberger, for respondent.

The general term reversed the order of the special term upon the ground that the service of the order for examination upon the attorney alone was not sufficient to warrant the order striking out the defendants' answer. No written opinion was filed.

NOTE.—A ruling to the same effect was made by the Saratoga special term of the supreme court (7 *Weekly Digest*, 312), in which judge BOCKES (on p. 314) says: "Without further elaboration of this subject here I will remark that I have carefully considered the case of *Riddle agt. Cram* (5 *Weekly Dig.*, 277) and am entirely satisfied with the line of reasoning there adopted." [REP.]

Carpenter agt. Roberts.

SUPREME COURT.

FRANKLIN CARPENTER agt. RANDEL W. ROBERTS and
ROBERTS' MANUFACTURING COMPANY.

Stockholder's action against a trustee for property of a corporation converted by him to his own use — Parties.

A stockholder of a corporation may maintain an action in his own name, and in the behalf of all others similarly situated, to recover of a trustee property of the corporation which the trustee has converted to his own use, the corporation being made a party defendant.

Special Term, October, 1878.

DEMURREE to complaint.

Royal S. Crane, for demurrer.

H. F. Averill, opposed.

VAN VORST, J.— *Greaves* agt. *Gouge* (69 N. Y., 154) justifies this action in the form in which it is brought (S. C., 49 How. P. R., 79).

The plaintiff sues not only for himself but also in behalf of all other stockholders.

The corporation, of which the defendant Roberts is a trustee, and the money and property of which he has converted to his own use, declines, upon application of the plaintiff a stockholder, to bring an action for its recovery, and it is made a defendant.

Under such circumstances, the plaintiff, a stockholder, is

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justified in bringing an action, for himself, and all others similarly situated, to obtain appropriate redress, in the form in which this action is brought.

It would be a reproach to the administration of justice and equity, if there was no remedy for wrongs of this nature.

Fortunately there is (*Russel agt. Wakefeld, L. R.*, 20 *Equity*, 474; *Allen agt. The New Jersey So. R. R. Co.*, 49 *How. Pr. R.*, 14 and cases cited).

The decree, if this cause goes to final judgment, will adequately protect all interests.

The defendants argue that the complaint discloses no special damage to the plaintiff. The damage to the plaintiff, and the other stockholders, appears in the fact alleged, that the assets of the corporation have been taken by the defendant Roberts and converted to his own individual use, illegally, wrongfully and fraudulently. This is a direct injury to all the stockholders, and they can only be made good through a recovery to them, or to the corporation, of the amount of the property so illegally converted.

There should be judgment for the plaintiff on the demurrer, with liberty to the defendant to answer on payment of costs.

Fischer agt. Raab *et al.*

N. Y. COMMON PLEAS.

JOHN FISCHER agt. JOHN RAAB *et al.*

Motion to punish for contempt for non-payment of referee's fees under stipulation and order of the court — when referee's certificate sufficient — Service of papers in contempt proceedings — Demand of fees — Code of Civil Procedure, section 14.

Where a party in a proceeding agrees in open court to pay the expenses of a reference in a certain event, and the event on which his liability depends occurs and he is ordered to pay and refuses, giving no reason, he may be punished as for a contempt under section 14, subdivision 3 of the Code of Civil Procedure.

When a referee certifies to a certain fact which was sworn to on the reference before him, such certificate is sufficient and proper.

Service of an order requiring a party to pay and to show cause, in default thereof, why he should not be punished for contempt, is properly made on him personally. If he cannot be found it may be served on his attorney. A demand is not necessary in addition to the service of the order requiring him to pay.

Special Term, November, 1878.

THE plaintiff, with some eighty others, was a member of an unincorporated German benevolent society known as "*Die Kranken Unterstützungs Verein Deutsche Treu und Ewigkeit*," which being translated into English means, "*The Sick Benevolent Society German Faith and Unity*;" becoming dissatisfied he brought an action in the court of common pleas for a dissolution of the society, and obtained a preliminary injunction against the officers of the society with an order to show cause why the same should not be made perpetual and for the appointment of a receiver of the property and funds of the society. On the motion to continue the injunction and for the appointment of a receiver, forty-two of the

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defendants, who were represented by J. C. Julius Langbein, Esq., in opposition thereto, produced an affidavit signed and sworn to by them to the effect that the plaintiff made a motion at a meeting of the society to dissolve the society, and then at a *subsequent* meeting the plaintiff also made a motion to "overthrow" and cancel his former motion, "*and that the society continue as before.*" As the effect of the last motion would *estop* the plaintiff in his action, this affidavit was impeached, the plaintiff contending that the forty-two defendants, being Germans, did not understand what they had sworn to, and that the fact was that the plaintiff did not make the second motion, but that the same was made by some other member of the society. The plaintiff desiring a reference as to this disputed question of fact, judge JOSEPH F. DALY referred the matter to judge John A. Dinkel "to determine and report upon such fact with all *convenient speed*," and by said order of reference it was provided that, "*the plaintiff to pay the expenses of said reference unless the said forty-two defendants, or a majority of them, shall testify upon said reference that they did not make, for the purpose of their said affidavit, the statement that plaintiff made the motion aforesaid, in which case the defendants represented by Mr. Langbein shall pay such expenses.*" The referee after hearing testimony, for nearly three months, made his report in favor of the forty-two defendants and reported, that under the order of reference, the plaintiff must pay the referee's fees amounting to the sum of \$130; upon this fact being shown to judge DALY, an order was made that the plaintiff pay the fees of the referee within three days, or show cause why he should not be committed for contempt. The fees not being paid, an order was made that a commitment issue, and the plaintiff was locked up in Ludlow street jail.

Henry Wehle, Charles Goldzier and Edward Grosse, for plaintiff.

George F. & J. C. Julius Langbein, for defendants.

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J. F. DALY, *J.* — Plaintiff having moved for a temporary injunction, which motion was opposed by defendants, an issue was raised upon the affidavits as to whether plaintiff had not, at a meeting of the society of which he and defendants were members, held May 6, 1878, made a motion to cancel or "overthrow" the proceedings of a prior meeting, held April 28, 1878, and continue the society. As the effect of such a motion by plaintiff would *estop* him from claiming, as he did on the application for an injunction, that the society was dissolved, both parties desired me to refer the question of fact to a referee; the question as to who should pay the expenses of the reference was then discussed. The plaintiff's counsel had charged that the forty-two defendants, who made affidavits on the motion against him, being German, unacquainted with the English language, were misled in signing and swearing to their affidavits containing the averment that he made the motion imputed to him at the society meeting, and the truth or falsity of his charge, it was agreed should determine whether he should, or should not, pay the referee's fees; if the forty-two defendants, or a majority of them, swore that they made the statement which appeared in their affidavits, he was to pay the fees; an order of reference containing that provision, in substance, was thereupon entered by consent.

The reference proceeded to a determination by the referee who gave a written notice and certificate that his report was ready for delivery, and that it was in favor of defendants, and that a majority of the forty-two defendants testified before him that they did make, for the purpose of their affidavit, the statement that plaintiff made the motion at the society meeting imputed to him; that the fees of the referee were \$130, and that plaintiff was required pursuant to the order to pay the fees.

I made an order upon this certificate and notice and the affidavit of defendants' attorney requiring the plaintiff to pay to the referee his fees within three days or show cause why he should not be committed and the injunction vacated and

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the motion for injunction and the appointment of a receiver denied and his proceedings stayed until such fees were paid.

The order and certificate and notice and affidavit were served upon plaintiff personally as directed by the order. The plaintiff appeared by his attorney of record and objected :

1st. That this application, so far as it related to the injunction and receiver, could only be made upon the referee's report on the question submitted to him, and upon notice to defendants demanding affirmative relief, *i. e.*, upon plaintiff's moving on the referee's report.

2d. That no contempt is alleged and plaintiff cannot be punished.

3d. No demand of the fees has been made; that the plaintiff is not required to pay the fees.

4th. That the court can take no notice of the report until it is filed.

5th. That the order to show cause why plaintiff should not be punished for contempt should be served on his attorney, and that this has not been done.

Plaintiff does not deny that a majority of the forty-two defendants have sworn that they made the statement which appears in their affidavits. He objects only to the mode in which notice of the fact is brought to the court.

I deem the proof of the fact sufficient and proper. The referee certifies to it and it is not denied.

Service of the order requiring plaintiff to pay, and to show cause in default thereof why he should not be punished for contempt, was properly made on plaintiff personally (*Albany City Bank agt. Schermerhorn*, 9 *Paige*, 372). If he could not be found it might be served on his attorney (*Pitt agt. Davison*, 37 *N. Y.*, 35). The object is to give notice to the party proceeded against. He has suffered nothing by the failure to serve his attorney as well as himself. His attorney appeared, on the return of the order to take the objections above specified, on plaintiff's behalf. Demand of the fees was not necessary in addition to the service of the order

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demanding him to pay. The order to pay not having been complied with the party may be punished as for a contempt (*Code, sec. 14, sub. 3*). The party has had his opportunity to be heard. The amount of fees is not disputed. The rate of compensation to the referee was agreed upon on the reference.

I am disposed to grant the order for commitment as prayed for. The plaintiff applied for this reference and stipulated to pay the expenses of it, if it turned out that the defendants had understandingly made the affidavits presented on the motion. Knowing the expense and vexation to parties of references to determine disputed facts arising in the course of a motion, I endeavored to dissuade counsel from this course, but the course was taken upon the strict agreement as to paying the expense which is embodied in the order of September 17, 1878, directing the reference.

It now appears that, after a most bitter contest before the referee, the fact upon which plaintiff's liability for the fees depends is found against him; whereupon he simply disregards the matter, neglects to take up the report, and is proceeding to press his cause for trial at the equity term without reference to the motion for injunction and receiver, or the questions referred for determination. Justice requires that he should be held to his stipulation. He agreed to pay the expenses of the reference in a certain event; his agreement was embodied in the order of reference, the event upon which his liability depends occurs; he is ordered to pay and he refuses, giving no reason. A commitment should issue

The People *ex rel.* Fischer agt. Reilly.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JOHN FISCHER agt. BERNARD REILLY of the city and county of New York.

Habeas corpus proceedings—Power of court of common pleas to commit for contempt for non-payment of expenses of reference.

The power of the court of common pleas to commit a party who desired a reference for a particular purpose, which was granted on his stipulating to pay referee's fees in a certain contingency, and then refusing or declining to pay them, not doubted.

Special Term, December, 1878.

THE plaintiff was committed by the common pleas for contempt for the refusal to pay certain fees of a referee which he had stipulated to pay in a certain contingency. The plaintiff thereupon procured a writ of *habeas corpus* from judge BRADY, in the supreme court, alleging in his petition that judge DALY had no jurisdiction to issue the commitment; that he was not charged before the judge with the commission of any contempt of court, or any act for which a commitment can issue.

Henry Wehle, Charles Goldzier and Edward Grosse, for plaintiff, relator.

Vanderpoel, Green & Cumming, for sheriff.

George F. & J. C. Julius Langbein, for defendants, respondents.

The People *ex rel.* Fischer agt. Reilly.

BRADY, J. — I have examined the matter and my conclusion is that the relator is not entitled to his discharge. The cause of the commitment sufficiently appears in the warrant, and the order upon which it is founded, and to which it refers, shows, in detail, the circumstances leading to the imposition of the fine.

The relator desired a reference for a particular purpose and it was granted on his stipulating to pay the referee's fees in a certain contingency. The event occurred and then the court directed the payment of the fees in accordance with the compact made. He refused or declined to pay, and for this contempt was committed. The power of the court to commit under the circumstances I do not doubt. The expensive process was adopted as a favor to the relator on his promise to pay and he was bound to keep it.

Writ dismissed with costs and prisoner remanded.

Randall agt. Sacket.

SUPREME COURT.

SAMUEL H. RANDALL agt. JAMES H. SACKET and another.

Survivorship of liability — Contract that of sureties — Code of Civil Procedure, section 758.

There is nothing necessarily retrospective in section 758 of the Code of Civil Procedure, and the provision, that "the estate of a person or party jointly liable on contract with others shall not be discharged by his death," applies only to future contracts.

Previous to the adoption of this section of the new Code the rule was that where the contract was that of sureties and joint, upon the death of one of such sureties his estate was absolutely discharged.

The rule as to the primary liability of the survivor is not changed by this section. It is not in the power of the legislature to extend the obligation. Nor will such an intention be imputed to the legislature if it can be avoided.

It might be necessary to bring in the representatives where the survivor was *insolvent*, and the plaintiff asked to proceed against them as in equity, or where the action was originally of an equitable character, or where the liability was several as well as joint, but where the action could not have been brought against the survivor together with the personal representatives of the deceased, that is, as an ordinary action at law, without an averment of inability to procure satisfaction from the survivor, it would be improper to substitute and join as defendants the executor of a deceased party.

Special Term, November, 1878.

MOTION, under section 758 of the Code of Civil Procedure, for continuance of action against executors of defendant Sackett.

*Plaintiff in person, for motion.**N. B. Hoxie, for defendant, opposed.*

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BARRETT, J. — (1.) The contract was that of sureties and it was joint. Upon the death of one of such sureties his estate, by the law existing at the time of entering into the obligation, was absolutely discharged (*Wood agt. Fiske*, 63 *N. Y.*, 245). This rule was engrafted upon the contract precisely as though it had been written therein (*McCracken v. Hayward*, 2 *How. [U. S.]*, 612; *Ogden agt. Saunders*, 12 *Wheat.*, 213), and it was not in the power of the legislature to extend the obligation (*Same cases*).

This was expressly held by Mr. justice NELSON in *Fielden agt. Lahens* (6 *Blatch.*, 524), a case very similar to the present.

Nor will such an intention be imputed to the legislature if it can be avoided (*Berley agt. Rampacher*, 5 *Duer*, 183; *Jackson agt. Van Zandt*, 12 *Johns.*, 169; *Hackley agt. Sprague*, 10 *Wend.*, 114; *Palmer agt. Conly*, 4 *Denio*, 374, and 2 *Comst.*, 182; *Dash agt. Van Kleck*, 7 *Johns.*, 377).

There is, in fact, nothing necessarily retrospective in section 758 of the Code of Civil Procedure, and full effect can be given to the provision, that "the estate of a person or party jointly liable on contract with others shall not be discharged by his death," by making it applicable to future contracts.

This provision does not, as claimed, merely go to the remedy but very clearly affects the liability. As was said in *York agt. Peck* (14 *Barb.*, 648), the principle of non-liability does not result from any difficulty attending the procedure but "from the form of the contract. The parties have so contracted. *It would add to the liability which the parties have by their contract assumed to make the estate of the deceased liable.*"

(2.) There is another objection to this motion, and that is, that the section does not change the rule as to the primary liability of the survivor. If this action were to proceed as at law against the survivor and the representatives of the deceased it would involve the practical inconvenience of a judgment, personal against the one and *de bonis testatoris*

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against the other. This would be improper (*Union Bank* agt. *Mott*, 27 *N. Y.*, 136; *Gardner* agt. *Walker*, 22 *How. Pr.*, 405). The plaintiff here does not ask to revive as in equity against the executors, leaving the survivor in, merely as a necessary party with an averment of his insolvency. He simply asks to proceed as at law, substituting the executors for the deceased and leaving the pleadings as they are. All that the section says is, that the estate shall not be discharged. That leaves the case as though the sureties were ordinary joint debtors bound for the debt, irrespective of the joint obligation, and, consequently, with a liability in equity against the representatives of the deceased after exhausting the legal remedy against, or averring the insolvency of, the survivor.

The context favors this construction, as it is further provided that the court *may* (not "*must*," a word so frequently used in this new Code) bring in the proper representatives, "*when it is necessary so to do, for the proper disposition of the matter*;" and, also, that where the liability is several as well as joint the court may direct a severance and permit the personal and representative phases of the case to proceed separately. It may be *necessary* to bring in the representatives where the survivor is insolvent and the plaintiff asks to proceed against them as in equity, or where the action was originally of an equitable character, or where the liability is several as well as joint, but scarcely otherwise. As the action could not have been brought against the survivor together with the personal representatives of the deceased, that is, as an ordinary action at law, without any averment of inability to procure satisfaction from the survivor, it would be improper to substitute and join as defendants the executors of Sacket (*Hauck* agt. *Craighead*, 67 *N. Y.*, 436).

The motion must, therefore, be denied, with ten dollars costs.

Dupre agt. Rein.

N. Y. COMMON PLEAS.

OVIDE DUPRE as trustee for CLARA REIN agt. PHILIP REIN.

Trustee of an express trust — Code of Civil Procedure, § 449 — Validity of agreement between husband and trustee of wife — Complaint — Demurrer — Parties.

Where the defendant and his wife entered into articles of separation whereby the defendant agreed with her and plaintiff, as her trustee, that defendant and his wife should live separate and apart, and in consideration of the premises defendant, among other things, agreed to pay, or cause to be paid, to the plaintiff, as such trustee, twenty-five dollars per week for the support and maintenance of his wife, the trustee covenanting and agreeing with the defendant to indemnify and bear him harmless from all debts of said wife contracted, or to be contracted, by her or on her account, each of the parties being bound by mutual covenants to carry out the agreement; in an action by the trustee against the husband to recover the sum of \$3,825 balance of unpaid weekly installments:

Held, that the contract with plaintiff was for the benefit of another and constituted him a trustee of an express trust within the meaning of section 449 of the Code of Civil Procedure. He alone would be liable to the husband for the wife's breach of covenants, and the action is properly brought in his name.

In articles of separation between husband and wife, through the intervention of a trustee, the covenant on the part of the husband to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy.

A complaint in such an action which simply sets forth the agreement *in extenso* and declares a breach of it for failure to pay is not good pleading. As the law only tolerates such an agreement when it can be enforced by a third person acting in behalf of the wife, all facts, by way of inducement, should be pleaded to enable the court to decide whether or not a *prima facie* case is presented

Dupre agt. Rein.

Special Term, December, 1878.

George E. Horne, for demurrant.

Dupre & Veicht, opposed.

LARREMORE, J.—The complaint avers that, on September 21, 1874, the defendant and Clara Rein, his wife, entered into articles of separation, which are set forth in full, whereby the defendant agreed with her and Dupre, as her trustee, that defendant and his wife should live separate and apart, and in consideration of the premises, defendant, among other things, agreed to pay or cause to be paid to the plaintiff, as such trustee, twenty-five dollars per week for the support and maintenance of his wife. The trustee covenanted and agreed with the defendant to indemnify and bear him harmless from all debts of said wife contracted, or to be contracted, by her or on her account. Each of the parties were bound by mutual covenants to carry out the agreement. It was further averred that, although demand has been made therefor, only three weekly installments have been paid, and that there is due to the plaintiff, as such trustee, the sum of \$3,825, for which he demands judgment, with interest and costs.

The defendant demurs on the following grounds:

1st. Defect of parties plaintiff.

2d. That the complaint does not state facts sufficient to constitute a cause of action.

The first ground must be overruled. The contract with plaintiff was for the benefit of another. This constituted him a trustee of an express trust (*Sec. 449, Code Civil Procedure*). He alone would be liable to the husband for the wife's breach of covenants (*Bishop on Marriage and Divorce, sec., 647*), and the action is properly brought in his name (*Parsons on Contracts, s. 357; Fenner agt. Lewis, 10 John., 38; Nichols agt. Palmer, 5 Day, 47 Conn.; Goddard agt. Beebe, 4 Greene, 350 [Iowa]; Dunning agt. Williams, 26 Conn., 226*).

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The second ground of demurrer puts at issue both the validity of the agreement and the sufficiency of the allegations of the complaint.

The courts have never recognized nor countenanced any agreement between husband and wife that seeks, independent of the statute, to effect a practical dissolution of the marriage relation. But the obligation of the husband to support, and the trustee to indemnify, as provided in this agreement, has been repeatedly upheld by express judicial sanction when there has been a present and actual separation.

LORD BROUGHAM recognized this doctrine in *Warrender agt. Warrender* (2 *Clark & Finnelly*, 527), and other English authorities maintain it (*Elsworthy agt. Bird*, 2 *Simon & Stuart*, 372; *Wilson agt. Wilson*, 31 *Eng. Law & Eq.*, 29; 1 *House of Lords' Cases*, 538; 5 *House of Lords' Cases*, 40; *Jee agt. Thurlow*, 2 *Barn. & Cress.*, 547; *Westmeath agt. Salisbury*, 5 *Bligh*. [*N. S.*], 339).

In *Worrall agt. Jacob* (5 *Meriv.*, 256) the master of the rolls held it as settled law that the courts would enforce such an agreement. To the same effect is *Fletcher agt. Fletcher* (2 *Cox*, 99). In *Elsworthy agt. Bird* (*supra*) the vice-chancellor held that, as the agreement contained an engagement on the part of the trustees to indemnify the husband from his wife's debts, in consideration of his stipulation to pay her fifty pounds a year, the court would enforce the stipulation.

It is unnecessary to encumber the record with the citation of authorities in the different states which uphold the same theory. It will best serve my purpose to refer to decisions in this state in support of the proposition already advanced (*Heyer agt. Burger*, 1 *Hoff.*, 1; *Champlin agt. Champlin*, 1 *Hoff.*, 55; *Carson agt. Murray*, 3 *Paige*, 483; *Rodgers agt. Rodgers*, 4 *Paige*, 516; *Calkins agt. Calkins*, 22 *Barb.*, 97; *Simmons agt. McElwain*, 26 *Barb.*, 419; *Crapsey agt. McKinney*, 30 *Paige*, 47; *Wallace agt. Bassett*, 41 *Barb.*, 92; *Anderson agt. Anderson*, 1 *Edwards Ch.*, 380).

From the cases cited the conclusion follows that in articles

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of separation between husband and wife, through the intervention of a trustee, the covenant, on the part of the husband, to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy. The remaining question is the sufficiency of the allegations of the complaint to constitute a cause of action.

The plaintiff has treated the agreement in question as an instrument for the payment of money only (*Code, sec., 534*). Upon this point I think he has misapprehended the spirit and intention of the statute. The contract, on the part of the husband, to pay for the support of his wife was environed by conditions precedent or concurrent, which constituted the consideration of the contract. To set forth an agreement of this character *in extenso* and declare a breach of it for failure to pay is not good pleading. It does not appear that the contemplated separation ever took place (*Carson agt. Murray, supra*).

As the law only tolerates such an agreement when it can be enforced by a third person acting in behalf of the wife (*4 Paige, 516*), all facts by way of inducement should be pleaded to enable the court to decide whether or not a *prima facie* case is presented. Upon this branch of the demurrer the defendant must prevail, with leave to plaintiff to amend his complaint on payment of costs. Upon the other issues of the case, the demurrer is overruled, with leave to the defendant to answer on payment of costs.

Field agt. Gibson.

SUPREME COURT.

HECKSON W. FIELD agt. VIRGINIA E. A. GIBSON, as executrix of the last will and testament of RICHARD P. GIBSON, deceased.

Foreign executors — actions at law and in equity.

Foreign executors are not recognized in their official capacity by domestic courts of law, and they cannot be sued therein as such. They may, however, be proceeded against in equity under certain circumstances, and upon proper allegations, to prevent waste of property brought within the jurisdiction, and secure its application to the payment of the debts of the testator according to the law of the state whence they derived their authority.

Special Term, October, 1878.

DEMURRER to complaint. The ground of demurrer was that the court has not jurisdiction of the defendant, as executrix, &c., nor of the cause of action against her, as executrix, &c., &c.

Dailey & Perry, for defendant.

Jackson & Henry, opposed.

VAN VORST, J.— This is an action for the recovery of rent due by the terms of a lease. The defendant is prosecuted as executrix of the last will and testament of Richard P. Gibson, deceased, who, in his lifetime, executed the lease under which the rent accrued.

The complaint alleges, that the defendant, by an order or determination of the surrogate of Monmouth county, in the state of New Jersey, duly made, was, on the 16th day of March, 1875, appointed, and now is, the executrix of the will of the

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deceased, Richard P. Gibson, and as such took possession of the premises which plaintiff had leased to the decedent.

It is a general rule of law, that foreign executors are not recognized in their official capacity by domestic courts of law, and cannot be sued therein as such (*Campbell agt. Tousey*, 7 Cowen R., 64; *Vermilya agt. Beatty*, 6 Barb., 429; 2 *Kent's Com.*, 432, note C; *Leonard agt. Putnam*, 51 N. H., 106; *Metcalf agt. Clark*, 41 Barb., 45; *Dolittle agt. Lewis*, 7 John. Chy., 45).

I am, however, referred by the learned counsel for the plaintiff to *Gulick agt. Gulick* (33 Barb., 92), as an authority which sustains this action. But it is to be borne in mind that this action is at law to recover upon an obligation of the testator; no equitable relief is sought, but a money judgment only is demanded.

Gulick agt. Gulick was an action in equity, in which the defendants were asked to account and pay the avails of certain property, which had been received and converted.

The property had been brought within this jurisdiction.

BOOKES, J., in *Metcalf agt. Clark* (*supra*), in alluding to *Gulick agt. Gulick*, notices the fact that it was an action in equity.

Actions in equity have been entertained, within this jurisdiction, against foreign executors who have brought, or had, in this state, property of the testator to prevent, upon proper allegations, its waste, and secure its application to the payment of the debts of the testator, according to the law of the state whence the executors derived their authority.

This has been allowed to prevent a total failure of justice (*Brown agt. Brown*, 1 Barb. C. R., 189; *McNamara agt. Dwyer*, 7 Paige, 259).

But when it is sought to recover a money judgment only against a foreign executor, the creditor should be remitted to the forum which has jurisdiction over him in his representative character. This court has no such jurisdiction, and there should be judgment for the defendant upon the demurrer with costs.

Hurricane Patent Lantern Co, agt. Miller & Co.

SUPREME COURT.

THE HURRICANE PATENT LANTERN COMPANY agt. EDWARD
MILLER & Co. and G. W. WOODWARD.

Trade-mark — what does not constitute an infringement of.

In a suit to restrain the use of trade-marks alleged to be simulated, if it appears by the testimony that the marks used by the defendants, though resembling those of the plaintiffs in some respects, have not deceived and are not likely to deceive the ordinary mass of purchasers paying the attention which such persons usually do in buying the article in question, an injunction will not be granted.

Where the alleged imitation by the defendants of the plaintiffs' trade-mark consisted, among other things, in the directions for the use of the article, which directions were identical with those printed on the plaintiff's label.

Held, that this did not constitute an infringement of the plaintiffs' trade-mark.

Held, also, that the words "*tempest*" and "*hurricane*" are not to be regarded as so similar as to warrant the conclusion that the public is liable to be misled into believing that the articles to which these words are applied are of the same manufacture.

Special Term, September, 1878.

Mr. Blanke, for plaintiffs.

Mr. Betts, for defendants.

LAWRENCE, J.—A perusal of the testimony in this case has strengthened the impression which I formed upon the trial, that the defendants have done nothing which entitles the plaintiffs to the injunction prayed for in the complaint.

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The testimony establishes to my satisfaction that although the defendants intended to manufacture and place upon the market a lantern which should possess essentially the same features, as to quality and character, as the plaintiffs' lantern, they have not been guilty of an infringement of any of the plaintiffs' rights. Nor can I find upon the evidence that in point of fact the public has been deceived, or is likely to be deceived, by the resemblance between the pictures of the lanterns respectively shown upon exhibits A and B, attached to the complaint. The language of the two exhibits is identical, but the plaintiffs cannot claim an exclusive right to the use of such language. They can have no copyright in it.

If the resemblance between the pictures of the lanterns, shown upon exhibits A and B, had been so close and striking as to convince me that the defendants intended to perpetrate a fraud upon the public, and to represent their goods as those of the plaintiffs, the fact that the language of the circulars was identical would have been important.

But the pictures referred to are so dissimilar that they cannot, in my opinion, be mistaken as intended to represent the same article by any but the most careless observer. This case, therefore, falls within the principles laid down in *Falkinburgh agt. Lucy* (*American Trademark Cases*, pp. 459 and 460, and in the cases there cited).

In *Falkinburgh agt. Lucy*, as in this case, the alleged imitation by the defendant of the plaintiff's trade-mark consisted, among other things, in the directions for the use of the article, which directions were identical with those printed on the plaintiff's label, and yet it was held that this did not constitute an infringement of the plaintiff's trade-mark (*See, also, Tallcott agt. Moore*, 6 *Hun*, 106). I do not regard the words "tempest" and "hurricane" as so similar as to warrant the conclusion that the public is liable to be misled into believing that the lamps are of the same manufacture.

Such being my conclusion, it follows, under all the authorities, that the defendants have been guilty of no wrong of

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which the plaintiffs can complain, and that the plaintiffs are not entitled to the injunction which they seek (*See Talcott agt. Moore*, 6 *Hun*, 106; *Partridge agt. Menck*, 2 *Sand. Ch.*, 622; *same case*, 2 *Barb. Ch.*, 104, 105; *Snowden agt. Noah, Hopkins Ch.*, 347; and *American Grocer Pub. Assn. agt. Grocer Pub. Co.*, 51 *How.*, 404). There should, therefore, be judgment for the defendants.

Findings may be settled on five days' notice.

Ellsworth agt. Smith.

SUPREME COURT.

ELLSWORTH agt. SMITH & BROWN.

Complaint—dismissal of, for neglect to proceed—Code of Civil Procedure, section 822—Referee's refusal to proceed, without his fees were paid—remedy in such case.

Where a cause was at issue and had been referred and several hearings had been had before the referee, when the latter declined to appoint another hearing until his fees were paid, the case remaining in this condition for over two years:

Held, that the plaintiff had unreasonably neglected to proceed in the action, and the motion to dismiss the complaint was properly granted.

It is not a good answer to the motion that the defendants themselves might have noticed the case for trial. The plaintiff had the affirmative. He was the actor until his case was presented and closed, and was himself bound to proceed.

If a referee refuse to proceed in the reference he may be removed and another appointed in his place.

It seems, that, on sufficient grounds, the court would require the deposit of money to meet the fees of the referee before he would be required to proceed; but such requirement would rest on something unusual and peculiar to the particular case.

Third Department, General Term, November, 1878.

Before LEARNED, P. J., BOARDMAN and BOCKES, JJ.

BOCKES, J.—This is an appeal from an order made at special term, pursuant to section 822 of the Code of Procedure, dismissing the complaint for want of prosecution. The order was provisional and gave the plaintiff ninety days' additional time in which to proceed, hence was unusually liberal in its terms.

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It appears that the case was at issue and had been referred to a referee to hear and determine ; that several hearings had been had before the referee, when the latter declined to appoint another hearing until his fees were paid. The case remained in this condition for over two years, when this motion to dismiss the complaint was made.

We are of the opinion that the motion was properly granted. There had been an inexcusable neglect on the part of the plaintiff to proceed in the action. Nor is it a good answer to the motion that the defendants themselves might have noticed the case for trial. The plaintiff had the affirmative. He was the actor until his case was presented and closed, and was himself bound to proceed (*Ray agt. Thompson*, 8 *How.*, 253 ; *Bowles agt. Van Horn*, 11 *Abbott*, 84 ; *same case*, 19 *How.*, 346 ; *see, also, former and present rules of the court*). We do not here intend to hold that a party may be required to pay a referee his fees in advance ; or that any payment for fees should be made by a party to a referee until his report or decision is signed and ready for delivery. There may, possibly, be cases where this would be admissible, but they can be of rare occurrence and, as a rule of practice, such a proceeding would be reprehensible in the extreme. It might lead to great abuse, and is suggestive of manifest impropriety. If a referee refuse to proceed in the reference, he may be removed and another appointed in his place. So, too, on sufficient grounds, the court would, perhaps, require the deposit of money to meet the fees of the referee before he would be required to proceed ; but such requirement would rest on something unusual and peculiar to the particular case. In the case before us the plaintiff, in so far as is made to appear, omitted all effort to bring the case to a close for a period exceeding two years. He might have moved for the discharge of the referee, on the ground that the latter declined to entertain the reference, when all the facts being made to appear, the court would, by a proper order, put him in a position to proceed, either by superseding the referee, or by

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directing the deposit of his fees, in case that should be deemed right; but the plaintiff took no steps whatever to bring the case to trial. This he could not omit to do for an unreasonable length of time. He was bound to proceed with diligence. The alleged difficulty in the way of proceeding in this case was not caused by the defendants. Therefore, if any in fact existed, it lay with the plaintiff to remove it. As the case is here presented, action by the plaintiff was open to him, and it was his duty to proceed in the case. This he unreasonably neglected to do.

The order appealed from must be affirmed, with ten dollars costs of appeal and disbursements for printing.

LEARNED, P. J., and BOARDMAN, J., concur.

Dunham agt. Mercantile Mutual Insurance Company.

N. Y. SUPERIOR COURT.

DUNHAM agt. THE MERCANTILE MUTUAL INSURANCE COMPANY.

Examination of parties before trial — Non-resident — Code of Civil Procedure, sections 872-886, 887.

To obtain the examination of a party before trial, each requirement of the Code must be satisfied in the affidavit upon which the order is based. Service upon the attorney only is not *always* sufficient (*See Pake agt. Proal*, 54 How., 93; *Mayer et al. agt. Noll et al.*, ante, 214.)

General Term, November, 1878.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

W. G. Peckham, Jr., for appellant. This plaintiff, a non-resident of the state (and as such giving security for costs here), being in Canada, had no notice of this proceeding, and no service has been made on him personally. A commission was, on the papers, the only proper way to get this plaintiff's testimony under the new Code; it came not under the class "deposition within the state," but clearly under section 887, "depositions without the state." The court could form no opinion as to whether the party resided here or in Yokohama, unless his residence be given. The whole matter should fall on the jurisdictional defects of the non-statement of the residences of plaintiff and his attorney, and of the non-statement as to the name of the attorney appearing for plaintiff in this cause, which left the court powerless to judge whether the attorney served had authority to represent the plaintiff. With less reputable parties than the defendant

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this last omission would leave it possible for unauthorized counsel to appear by collusion for a distant plaintiff (*Beach* agt. *The Mayor*, 4 *Abb. New Cases*, 236; *Loeb* agt. *Levy*, *gen. term superior court*, *May*, 1878).

Scudder & Carter, for respondent. It is stated in the affidavit that plaintiff's residence is unknown. Service on the attorney alone is sufficient (*Pake* agt. *Proal*, 54 *How.*, 93). Payment of a witness fee has only been held necessary to put the party in contempt (*Freiberg* agt. *Branigan*, 3 *Abb. Cases*, 122). A party who voluntarily brings suit and puts himself under the jurisdiction of the court can claim no exemption from its rules, and wherever he is he should be punished for not complying with its orders by having his pleading stricken out, as the Code provides (*sec.* 853).

CURTIS, *Ch. J.*—The affidavit upon which the defendant applies for the examination of the plaintiff fails to comply with the requirements of sections 872 and 886 of the new Code of Civil Procedure. It omits any statement of the residence of the plaintiff or that any inquiry has been made to ascertain it, or that there is any difficulty in learning it. It omits to state whether the plaintiff has appeared by attorney; nor does the name, residence or office address of any attorney on plaintiff's behalf appear in defendant's affidavit. There is no proof of any notice to the plaintiff of this order for his examination, or that any order, affidavit or subpoena has been served upon him in respect to it. To sustain the order under such circumstances might subject non-resident parties to great hardships. It appears from the defendant's affidavit that the plaintiff resides in another state, and if so he is entitled to the protection given him as a non-resident of this state by section 886.

The order appealed from should be reversed, with costs.

All concur.

Perry agt. Rollins.

SUPREME COURT.

ANDREW J. PERRY, respondent, agt. TRUE W. ROLLINS,
appellant.

Action by an attorney for services — Answer — general denial and an allegation that the services have been fully paid for — Order of reference.

It seems that an order of reference may be had in an action by an attorney for professional services.

Quære. Is *Martin agt. Windsor Hotel Company* (10 Hun, 304) to be followed, or is a different rule to be established?

First Department, General Term, October, 1878. •

THIS was an appeal from an order made at special term directing a reference to hear and determine the issues.

The action was brought by plaintiff, as an attorney and counselor at law, for professional services rendered for defendant. The defendant's answer is a general denial of the allegations in the complaint, and alleges that plaintiff rendered certain services for defendant and one Samuel Ward, as trustees for the bondholders of the Gold Valley Mining Company, and that he has been fully paid therefor. The order of reference was made upon the pleadings, the bill of particulars consisting of about sixty items and an affidavit of plaintiff that the trial of the action would involve the examination of a long account.

T. C. & Chas. G. Cronin, for the appellant. The trial of this action will not involve the examination of a long account. The plaintiff's bill of particulars is not an account

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proper, in the legal sense of the term (*Dickinson* agt. *Mitchell*, 19 *Abb.*, 286). Compulsory references are not matters of right, but of judicial discretion, and the constitutional provision of the right to trial by jury cannot be too faithfully preserved. On the issues in this action, the defendant should have the right of submission to a jury, being for the professional services of a lawyer (*Flanders* agt. *Odell*, 16 *Abb.* [N. S.], 247; *Martin* agt. *Windsor Hotel Co.*, 10 *Hun.*, 304).

A. J. Perry, plaintiff in person. There is no fact in this case which comes within the purview of any of the recent cases where references have been denied.

The account is sufficiently established by the bill of particulars (*Place* agt. *Cheeseborough*, 4 *Hun.*, 577). The bill of particulars contains upwards of sixty items involving labor on at least sixty different days, making a "long account" within the judicial definition and meaning of that expression (*Continental Bank Note Co.* agt. *The Industrial Exhibition Co.*, 1 *Hun.*, 118).

Present, DAVIS, P. J., BRADY and INGALLS, JJ.

Order of reference affirmed; *no opinion*.

George agt. Grant.

SUPREME COURT.

CHARLES H. GEORGE and another agt. RICHARD T. GRANT
and others.

*Amendment of complaint, when not allowed "as of course" — Separate trials
as to different defendants — Code of Civil Procedure, sections 542-967.*

Where one of several defendants served with the complaint demurred thereto and the demurrer was noticed for argument, and nearly three months thereafter another defendant was served with the complaint:

Held, that the plaintiff could not amend the complaint, as of course, as to the defendant who had demurred, although the amendment was claimed within twenty days of the time the last complaint was served. Section 542 of the Code of Civil Procedure applied.

A separate trial between the plaintiff and one or more defendants may be directed by the court in its discretion. But where there are demurrers interposed by several defendants they should be brought on for trial at the same term (*Code of Civil Procedure, sec. 967*).

Special Term, October, 1878.

MOTION by plaintiffs to strike cause from the calendar, upon the ground that the issue of law which was urged for trial had been superseded by an amendment of the complaint; and further, that a separate trial should not be had by one of several defendants.

Mr. Blair, for plaintiff, in support of motion.

Mr. Forster, opposed.

VAN VORST, J.— The issue, formed by the demurrer of the defendant Palmer, was properly noticed for trial, and is

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regularly on the calendar. This issue must be disposed of in an orderly way, and the plaintiffs cannot get rid of it by an amendment of the complaint, as a matter of course, within a few days of the term for which the demurrer is noticed for argument. Such attempted amendment of the complaint, if objected to, cannot be upheld, although made within twenty days after the service of an answer or demurrer interposed by another defendant, issued some months after the issue of law was formed by the earlier demurrer. Section 542 of the Code of Civil Procedure provides that, within twenty days after a pleading or the answer or demurrer thereto is served, or at any time before the period for answering expires, the same may be once amended by the party without costs, and without *prejudice to the proceedings already had*.

The right to amend the complaint, as to the defendant Palmer, whose demurrer was first served, was not exercised within the time limited, and it was then too late thus to amend as to him, nearly three months afterwards, although attempted to be done within twenty days after the service of a complaint upon another defendant, which was demurred to; effect must be given to the words in section 542, "without prejudice to the proceedings already had."

It would scarcely answer, after a case has been put at issue and noticed for trial by one or more defendants, to nullify, without indemnity of any kind, such proceedings, by the service of an amended complaint, because the plaintiff had omitted to serve his complaint upon another defendant until within a short time of the trial.

Such latter act should not justify an amendment of the complaint, as of course, as to another defendant who had, months before, put the cause at issue by a demurrer or answer.

The right to amend at such stage can only be secured by application to the court, and will be granted, if proper, upon such terms as to the court shall seem just and proper.

But this conclusion does not necessarily determine a right

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in this defendant to urge the trial of the issue formed by his demurrer at this time.

Section 967 provides that a separate trial between the plaintiffs and one or more defendants may be directed by the court in its discretion.

Such direction may be given by the judge holding the term, when the issue is regularly on the calendar.

We have already said that this issue is regularly on the calendar.

But it appears that a demurrer to the complaint has been interposed by another defendant, which issue has not been noticed for trial.

It does not seem advisable that the issue formed by the separate demurrer of the defendant Palmer should be disposed of by itself.

All the issues of law should be brought on at the same time.

It is best for the parties and the court that there should not be separate trials of issues of law, at different terms, when the goodness of the complaint and its sufficiency is the only subject of adjudication.

In this view, the case is set down for the next term of this court, when the case may, perchance, be in readiness for hearing.

Riggs agt. Waydell.

SUPREME COURT

ALBERT R. RIGGS agt. FREDERICK WAYDELL, JOHN W. WAYDELL and WILLIAM ANDERSON WAYDELL.

Offer to allow judgment to be taken — neglect to annex affidavit — Code of Civil Procedure, section 740.

An offer to allow the plaintiff to take judgment for an amount therein specified, signed by the defendants' attorney, but to which the affidavit required by section 740 of the Code of Civil Procedure is not annexed, is a nullity and the plaintiff is not required either to accept or reject it. There is no such thing as creating an offer by waiver. A plaintiff cannot waive it into validity as against a defendant. If a party desires the benefit of the statute he is bound to do just what the statute points out.

Special Term, January, 1879.

THE plaintiff resided in Morris county, New Jersey, and the defendants lived and were doing business in New York and Brooklyn. The action was brought, in October, 1877, to recover for a balance due the plaintiff from the defendants for a large quantity of hoops sold and delivered at various times from November, 1873, up to and including April, 1877, at the market prices, claiming over \$4,000, which the plaintiff believed, from the defendants' own showing, he was justly entitled to. The defendants put in an answer of general denial.

On December twenty-eighth an offer of judgment was made, subscribed by the attorney for defendants, of \$800, and interest from April 26, 1877. No affidavit was attached to the offer. January 5, 1878, the plaintiff's attorney, in writing without affidavit, declined to accept "the offer made."

The case was afterward referred. The plaintiff's attorney,

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in a letter to the defendants' attorney, said he had seen the plaintiff and that he could not "accept the offer made;" and in another letter he thought the attorney for the defendants ought not to demand a bond, which he did, inasmuch as he had "made an offer of judgment for several hundred dollars." No notice was permitted by the referee, and the attorney for the defendants, to be made to it afterward, when once or twice the attorney for the plaintiff spoke of it.

At the first meeting of the counsel before the referee it was agreed as to the number of hoops sent and the number received. There was no dispute as to the agreement. "The market prices of good hoops" were to be given, and those prices were substantially about the same as given on both sides. The only question was as to quality; and there seemed to be no difference there, as it was claimed on one side that they were "good, fair, merchantable hoops;" and on the other side, while they insisted there were many poor and indifferent, they asserted that they assorted them and threw out all such on receiving them and made them all good. There were about a dozen hearings. Three witnesses were called by the plaintiff and eleven by the defendants.

The referee found for the plaintiff for \$647.02, with interest from April 26, 1877, making, at the date of his report, November 4, 1878, \$722.49.

At the special term, held at supreme court chambers on the first Monday in January, 1879, the attorney for the defendants made a motion "for an order granting to the defendants in this action a further allowance, in addition to costs, to be computed upon the claim of the plaintiff in the action, and, if the same be necessary, allowing said defendants to serve upon said plaintiff's attorney the affidavit mentioned in section 740 of the Code of Civil Procedure, with the like effect as if the same had been annexed to and served on him with the offer for judgment made by the defendants in this action upon the 28th day of December, 1877, and for such further or other order as may be just and proper."

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The attorney for the defendants read his own affidavit; that at the time of making said offer he had been, and was, duly authorized to make it, but that he had "inadvertently overlooked and was not aware of the provision of section 740 of the Code requiring the annexation to such offer for judgment of an affidavit of deponent that he was duly authorized to make such offer;" and was not aware of it "until the 9th day of November, 1878."

The deponent further said, that his preparation for the defense and the trial, together with making his brief, "involved and received a large amount of time and labor," and that he verily believed "that the case was an extraordinary and difficult one, within the meaning of section 309 of the Code."

The plaintiff's attorney, in his affidavit, said, "that what purported to be an offer of judgment, which was not validly made, was only signed by the said attorney, and that the deponent never had any knowledge that the defendants themselves authorized it, and the plaintiff himself directed the deponent to have nothing at all to do with it, and never saw it, and the referee never took notice of it." He knew not "that the defendants then, or at any other time, had authorized any such an offer to be made. Neither had he in any way been authorized by the plaintiff to accept any such an offer."

The deponent further said that he did not think the case was either "difficult" or "extraordinary" on the part of the defendants as the case was heard in the city of New York where the attorney, defendants and their witnesses were; that the plaintiff was put to great inconvenience and annoyance, and might have been heard in his opinion by a court and jury at a single sitting. The sittings were brief and frequently interrupted. Twice the attorney for the defendants was engaged and adjournments were obliged to be had when no notice had been given by the defendants, and many witnesses were called which seemed wholly unnecessary.

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J. Hervey Cook, for plaintiff. The paper purporting to be an offer of judgment was subscribed by the attorney for defendants, and no affidavit was made or annexed to show any authority. The defect is not a mere irregularity but a matter of substance (*McFarren* agt. *St. John*, 14 *Hun*, 387). The case was not a difficult and extraordinary one, so as to entitle the party to an extra allowance (*Fox, Exrs.*, agt. *Fox*, 22 *How.*, 453; *Duncan* agt. *De Witt*, 7 *Hun*, 184; *Fox, Admr.*, agt. *Gould*, 5 *How.*, 280; *Main and others* agt. *Pope*, 16 *id.*, 271). In making a motion for an extra allowance in all cases where the trial has been by reference, the certificate of the referee should be procured (*Fox, Admr.*, agt. *Gould*, 5 *How.*, 280; *Main* agt. *Pope*, 16 *id.*, 271).

N. B. Howie, for defendants.

BARRETT, *J.*—There is no material distinction between this case and *McFarren* agt. *St. John* (14 *Hun*, 387). The declination was superfluous and left the matter precisely as though it had not been served. There is no such thing as creating an offer by waiver; either there was an effective offer or there was not. The plaintiff could not waive it into validity as against the defendants. True, he called it the defendants' offer, and so it was the defendants' invalid offer. It comes to this: If the defendants desired the benefit of the statute they were bound to do just what the statute pointed out. This they did not do, consequently the cause proceeded without a statutory offer. To talk of amending so as to alter the present legal status is to misconceive the office of amendment. Besides, that would be to make now and for the first time a good offer. That being so, by what authority would we deprive the plaintiff of his statutory right to accept within ten days from the present date? The motion to amend by adding the affidavit of authority required by section 740 of the Code of Civil Procedure and for an allowance must be denied, but under the circumstances without costs.

Boorman agt. Pierce.

N. Y. COMMON PLEAS.

Action No. 1.

J. MARCUS BOORMAN agt. PIERCE and others.

Action No. 2.

J. MARCUS BOORMAN and THE PACIFIC RAILROAD COMPANY
agt. ANDREW PIERCE and others.*Examination of parties before trial — Code of Civil Procedure, section 872 —
What affidavit should state to entitle party to order.*

Where the papers present good grounds for believing that a railway company has been wrecked, the widest scope should be given to stockholders who are attempting to unearth the frauds committed by the faithless directors.

But it is due to the administration of justice that the courts whose aid is invoked should know that those asking for its process have been injured pecuniarily by the wrongful doings of the directors.

An affidavit on which to base an order for the examination of a party defendant must state, as required by subdivision 2 of section 872: first, the nature of the action; second, the substance of the cause of action; and, third, the substance of the judgment demanded.

Where the action was brought by a stockholder against former directors of a railroad company to recover excessive prices paid for 800 shares of stock of the Pacific Railroad Company, and an order for the examination of the defendant before trial was asked for on an affidavit alleging that the action is brought "to recover as excessive prices paid in and before October, 1875, for 800 shares of Pacific railroad stock, on the faith of representations to him by some of the defendants, and in full reliance upon their personal character and statements, * * * and to recover either the unpaid value or the whole cost of said stock, together with indemnity for liabilities he may have incurred, unknowingly, in his belief of said representations; * * * and that plaintiff paid over fifty dollars per share for the stock, which is now worth only one dollar per share:"

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Held, that the affidavit failed to make out a proper case for the order. It is impossible to discover from the affidavit either the nature of the action or the substance of the cause of action. In short, no one can say what the action is about.

An affidavit is defective which alleges that the plaintiff's action is for a recovery under chapter 18, part 1, Revised Statutes. Such an allegation is worthless. It is too vague, indefinite and uncertain to be the foundation of any judicial proceeding.

A party ordered to be examined before trial cannot be compelled to answer where there is nothing to show that any of the questions are legal and pertinent.

Special Term, January, 1879.

THE action was brought to recover excessive prices paid for 800 shares of stock of the Pacific Railroad Company which the plaintiff purchased, as he alleges, on the faith of certain representations made to him by some of the defendants, who were former directors of the road, and charges of fraud are made against them.

In action No. 2 a motion was made to punish Mr. Pierce for refusing to answer certain questions put to him on examination before trial. Mr. Pierce resisted the motion to punish him, and moved to vacate the order for his examination, and also for the vacation of the order in action No. 1, in which action his examination had not been begun.

J. Marcus Boorman, plaintiff in person.

John E. Burrill, for defendant Pierce.

VAN HOESSEN, *J.* — Subdivision 2 of section 872, Code Civil Procedure, requires that the affidavit shall set forth: (1), the nature of the action; (2), the substance of the cause of action, and (3) the substance of the judgment demanded.

In action No. 1 the affidavit of Mr. Boorman is obviously defective. It alleges that the action is brought "to recover excessive prices paid in and before October, 1875, for 800 shares of Pacific railroad stock on the faith of representa-

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tions to him by some of the defendants, and in full reliance upon their personal character and statements, * * * and to recover either the overpaid value, or the whole cost, of said stock, together with indemnity for liabilities he may have incurred, unknowingly, in his belief of said representations, * * * and that plaintiff paid over fifty dollars per share for the stock, which is now worth only one dollar per share."

From these allegations, and the affidavit contains no others descriptive of the plaintiff's demand against the defendants, it is impossible to discover either the nature of the action, or the substance of the cause of action. It is not charged that any of the alleged representations were false, nor does it appear what the representations were. There is nothing to show that the plaintiff was deceived, or who deceived him, or what loss, if any, he sustained. In short, no one can say what the action is about.

The motion to vacate the order for examination should be granted, with ten dollars costs to the defendant Pierce, to abide the event.

In action No. 2 the affidavit is defective; it alleges that the plaintiff's action is for a recovery under chapter 18, part 1, Revised Statutes. Such an allegation is worthless; it is too vague, indefinite and uncertain to be the foundation of any judicial proceeding. It is, however, further alleged that the capital stock of the Pacific Railroad Company, of the Atlantic and Pacific Railroad Company, and of the Missouri Pacific Railroad Company, was withdrawn or divided; that certain improvement, income and third mortgage bonds of the company first named were issued; and that the Atlantic and Pacific Railroad Company refuses to carry out a lease of the Pacific Railroad, and to protect the rights of the Pacific Railroad Company and its stockholders. Except the bare allegation that the Atlantic and Pacific Railroad Company refuses to carry out a lease, there is nothing in the whole affidavit that charges, even by implication, a breach of contract

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or of duty upon any person, natural or artificial. All the averments of the affidavit may be true, and yet no action may be maintainable against any of the defendants. There is an utter failure to set forth either the nature of the action, or the substance of the cause of action. I entirely agree with judge DALY, to whom the application to punish Mr. Pierce for refusing to answer certain questions was first made, that the party could not be compelled to answer, because there was nothing to show that any of the questions were legal and pertinent (*Matter of Kip*, 1 *Paige*, 601; *Hynes* agt. *McDermott*, 55 *How. Pr.*, 263). It is due to the administration of justice that the court, whose aid is invoked, should know that those asking for its process have been injured by the defendants. The law is for the redress of grievances, not for the profit of free lances. It may be that the issue of bonds, which the plaintiff mentions in his affidavit, was an act of fraud perpetrated by the defendants, who were directors of the Pacific Railroad Company. If it were so, and if the company were injured thereby, a stockholder, acting for himself and for all other stockholders who choose to come in, may maintain an action against the directors, provided that the company, still in the hands of those who have defrauded it, refuses to sue. If a dividend be declared, but is withheld, a stockholder may maintain an action against the company to recover it. If the directors of a corporation wrongfully divide up and distribute the capital, falsely pretending that in doing so they are paying dividends that have actually been earned, they are liable for their wrongful act. If a railroad be leased, and the lessee, by a fraudulent combination with the directors of the lessor company, refuses to pay the stipulated rent, the stockholders of that company have their redress in a proper action. And whenever a stockholder, actually aggrieved, brings his action to obtain redress for the corporation to which he belongs, for a wrong done by directors who still retain control of its affairs, he is entitled to whatever advantages an examination before trial of the incriminated directors will afford

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him. It is possible that if all the facts were spread upon the record, the plaintiff would make out a case for the examination of the defendants in this suit. If he were a stockholder at the time of the perpetration of any frauds upon the Pacific Railroad Company, he ought to have the fullest opportunity to unearth them, and leave is given him to renew his application for the examination of the defendants; but his affidavit must state the substance of his cause of action.

The order for the examination of the defendant Pierce is vacated, with ten dollars costs, but the plaintiff has leave to renew his application on an affidavit conforming to the Code.

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SUPREME COURT.

ALEXANDER STEWART and ANN JANE BAILEY agt. CORNELIA
M. STEWART, HENRY HILTON and others.

Substitution of attorney — power of court to order — when motion by plaintiff to compel attorney to substitute another in his place will be granted — Burden of proof, when attorney's authority is questioned.

As a general rule, when the right of an attorney to use the name of a plaintiff is questioned by the *opposite party*, if the attorney be a reputable member of the bar, the court will not, unless the action be one for the recovery of land, require proof of the authority to be produced; but the right of the court to require its production in all cases is undoubted, and it will be exercised when, in its judgment, the ends of justice demand it.

Where an attorney has instituted a suit in which the name of a party appears as one of the plaintiffs, and his right so to do is challenged by the party whose name is used, he (the attorney) must affirmatively establish such right. The burden of proof rests upon the attorney.

Where the authority of an attorney to bring an action for the recovery of the possession of real estate adversely held is questioned by a party whose name appears as one of the plaintiffs, the attorney must produce a "written request of such plaintiff or his agent to commence such action," or a "written recognition of the authority of the attorney to commence the same."

Evidence as to the pretended authority of the attorney fully considered, and, *held*, that it did not show any authority whatever from the plaintiff, either *verbal* or *written*, to use his name; nor has the said plaintiff, in any way, since ratified such use.

The court has the power, even where there has been an original employment, upon good cause being shown, to remove an attorney from charge of the action and to substitute another in his place.

Where an attorney has willfully made a misstatement in the body of his complaint, and undertaken to deceive his opponent and the court alike upon a matter which might, for certain purposes in the administration of justice, as he supposed, be material, and permitted his client to

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verify the complaint which contained the falsehood by him knowingly inserted:

Held, that for such an act as this it would be entirely competent for the court to remove the attorney.

Where the evidence showed that the attorneys more than doubted the justice of their cause; that the action was commenced with a falsehood willfully inserted in the first pleading; that their hope of success was in a forced settlement; that a detective in the service of their adversaries was "bought over," as they supposed, to their interests; and by his treachery, as they hoped, the fears of parties interested in upholding the will were to be so worked upon as to secure \$100,000:

Held, that the attorney who thus seeks to carry on a litigation should be stopped by the mandate of the court.

At Chambers, September, 1878.

MOTION by plaintiff, Alexander Stewart, to compel Mr. S. F. Kneeland, the attorney who brings the above entitled action, to substitute Mr. Ira Shafer as attorney for the said Stewart.

Ira Shafer, for motion.

Chittenden & Andrews, opposed.

WESTBROOK, J.—The very voluminous papers submitted upon this motion, and continuous duties at circuit, have prevented an earlier disposition thereof. The action in which it is made was commenced in May, 1878, and professes to be one to partition the real estate of the late Alexander Turney Stewart among his heirs at law. The description of the real estate sought to be divided is very general, and the complaint, alleging that the plaintiffs and some of the defendants are the owners thereof as tenants in common, fails to state that the said Alexander Turney Stewart left a last will and testament, under which some of the defendants are claiming and holding adversely, and makes no allusion whatever to, or allegation concerning, such will, claims and holdings. The plaintiff, Alexander Stewart, now moves this court that S. F. Knee

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land, Esq., the attorney who instituted the action, should be removed from acting as such in his behalf, and that Ira Shafer, Esq., should "be substituted in his place and stead as the attorney for the said Alexander Stewart."

The motion is made upon the grounds:

First. Because the said Kneeland was never employed by him as such attorney; and

Second. Because the said attorney is not using the name of the said plaintiff in good faith, but, on the contrary thereof, in connection with Mr. Clark H. Chapman, an attorney and counselor at law of the state of Vermont, is endeavoring, wrongfully and wickedly, to extort money from the defendants, Cornelia M. Stewart and Henry Hilton, by means of such action and the use of the plaintiff's name.

As a general rule, when the right of an attorney to use the name of a plaintiff is questioned by the opposite party, if the attorney be a reputable member of the bar, the court will not, unless the action be one for the recovery of land, require proof of the authority to be produced; but the right of the court to require its production in all cases is undoubted, and it will be exercised when, in its judgment, the ends of justice demand it. In this case, however, a party, who declares his name is used without authority, invokes the aid of the court. Very clearly, if he has any interest in the property which is affected by the action, he has the right to select the attorney who will enforce it; and one whom he has not so chosen has no right to jeopardize that interest, and subject the party to the costs and expenses of a failure. In such a case, the individual who claims that the use of his name is unauthorized has the right, common to all mankind, to ask the court to redress a grievance. As the attorney has instituted a suit in which the name of the moving party, Alexander Stewart, appears as one of the plaintiffs, and as his right so to do is challenged by the party whose name is used, he (the attorney) must affirmatively establish such right. In holding that the burden of proof rests upon the attorney, the ordinary rules

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of logic and law are followed. He who claims that he has authority or right, derived from another, must, when it is questioned, prove it; and whether such claimed authority or right relates to the use of another's property or name, the rule is the same. The controversy is between men, and, though one is a layman and the other an attorney of this court, the court cannot presume, when an issue thereon is directly made, that the latter has acquired rights and powers over the property of the former, the exercise of which may subject him to great loss and injury, without affirmative proof that such rights and powers have been conferred. The use of Alexander Stewart's name as a plaintiff in an action must, as we have already intimated, affect his property. Mr. Kneeland claims that Mr. Stewart has authorized the act, and the authority must, therefore, be proved.

In the examination of the first point which this motion presents — the employment of Kneeland by Stewart to bring this action — before considering the great mass of affidavits and papers submitted, it will be well to discuss the question whether, conceding all that Mr. Kneeland claims to be true, he has a sufficient authority to institute and prosecute this action. Mr. Kneeland's claim is, that he saw a letter published in the New York Herald of June 7, 1876, purporting to be from the said Alexander Stewart to judge Hilton, in which a claim of being a cousin to the dead merchant is made by the writer, whereupon, on the ninth day of the same month, he wrote to the said Stewart, at his residence in Proctorsville, Vermont, informing him that "he," Kneeland, "was engaged or retained for other heirs in prosecuting their rights to the estate, and would he," Alexander, "like to join; if he would to send him," Kneeland, "the particulars of his relation." It is further claimed that Alexander Stewart, on the reception of this letter from Kneeland, in company with his son, Robert G. Stewart, called upon the before-mentioned Clark H. Chapman, at his office in Proctorsville, showed him the Kneeland letter and authorized Chapman to employ

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Kneeland to prosecute an action on his behalf, which facts Chapman communicated to Kneeland by letter dated July 6, 1876. A copy of the alleged letter from Kneeland to Stewart is not produced, and its reception by him the latter flatly denies; but the one claimed to have been written by Chapman to Kneeland on the 6th day of July, 1876, is exhibited and forms a part of the papers read upon this motion. A careful perusal of such letter, however, fails to disclose any direct request or authority to Kneeland to commence any proceedings whatever in behalf of Mr. Stewart. Who Stewart is, and his claim to relationship with the former New York merchant are set out, and he is called in such letter "our client," but not a word is said about any action whatever, nor is any power expressly conferred to bring one. The Revised Statutes (*6th edition, vol. 3 page 573, sec. 15*) provide: "Any written request of such plaintiff or his agent to commence such action, or any written recognition of such authority of the attorney to commence the same, duly proved by the affidavit of such attorney or other competent witness, shall be sufficient presumptive evidence of such authority." This provision is contained in title 1 of chapter 5 of part 3 of the Revised Statutes, which chapter is entitled, "Of Suits Relating to Real Property," and the title is entitled, "Of the Action of Ejectment." Is the section we have quoted applicable to this motion?

It has already been stated that the direct prayer for relief in the complaint in this action is to partition and divide the real estate of the late Alexander T. Stewart among the parties who are therein claimed to be his heirs at law. Confessedly, as has also been before said, the property is all held adversely by some of the defendants who claim under an alleged will of the deceased, Mr. Stewart, and to which no allusion whatever is made in the complaint. As the plaintiffs have not alleged "that such apparent devise" under which the property is claimed and held adversely "is void," as the Revised Statutes (*6th edition, vol. 3, page 60, sec. 22*) expressly require,

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it is very doubtful whether the action in its present form, without an amendment of the complaint, can be maintained (3 *R. S.* [6th edition], page 583, sec. 1; *Florence agt. Hopkins*, 46 *N. Y.*, 182). Assuming, however, that it can be, it is very evident that the primary relief, if it is successful, must be that the heirs at law recover the possession of the property, and that the parties holding adversely under the alleged will surrender such possession. In substance and fact, then, this action is one for the recovery of the possession of real estate adversely held, and to all intents and purposes is one identical with that which was formerly known by the name of "an action of ejectment," although the ultimate relief sought is partition among its owners, which, however, can only be accomplished after their right to its possession and enjoyment shall have been established by a trial. There is nothing, then, in the form or character of the action which prevents the full application of the statute.*

It may be argued, however, that the section we have quoted only declares and establishes the character of the evidence to be given, when the right of an attorney to institute the suit is questioned by the defendant. It is true that previous sections (12, 13, 14) prescribe the manner in which a defendant in ejectment may compel the attorney for the plaintiff to show his authority to bring the action; but the language of the fifteenth section is general, and is declaratory of the species of evidence which shall prove the power of the attorney to bring ejectment. From the general and broad words used in the last-mentioned section the conclusion seems to follow that the authority shall be evidenced by a writing in all cases, and the previous sections were inserted to enable the defendant to avail himself of its terms. If, as between the attorney of the plaintiff and the defendant, the former must produce a "written request of such plaintiff or his agent to commence such action," or a "written recognition of the authority of the attorney to commence the same," why should less than this

* See *Stewart agt. Munroe*, ante, 193.

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be required as between attorney and client? No reason for the distinction is perceived; and as the language of the section itself covers a case like the present, and as it is founded upon the general rule that all authority conferred over real estate shall be evidenced by a writing, it is held that Mr. Kneeland, unless this section of the statute is abrogated, must bring himself within its provisions.

That nothing short of written evidence of the power to bring the action, before the adoption of the Code, would answer, was well settled (*McDermott agt. Davison*, 1 *Howard's Pr. Rep.*, 194). In *Howard agt. Howard* (11 *Howard's Pr. Rep.*, 80) it was held: "The provisions of the Revised Statutes, in relation to the production of an authority of an attorney to commence an action of ejectment, apply to suits, under the Code, to recover land." Judge HAND, in that case, said: "The statute *requires* a written request to commence the suit, either by the plaintiff or his agent, or a written recognition of the authority of the attorney to do so (2 *R. S.*, 306)." The authority of this decision has never been questioned, and its soundness is expressly recognized in *Wait's Practice* (vol. 1, pages 564, 565), and it must now be regarded as settled law.

As this action is, in substance and fact, one for the recovery of land, and as Mr. Kneeland has no written authority to commence it, or a written recognition of his rights as an attorney, it follows that this motion must be granted upon this ground only. It is due, however, to the rights of the parties, and the magnitude of the interests involved, that the grounds more especially presented and urged upon the argument should also be examined. Had Mr. Kneeland any authority, whatever, from the plaintiff, Stewart, either verbal or written, to use his name, or has the said Stewart in any way, since ratified such use?

In the discussion and examination of this question of fact, which involves the careful reading of a mass of affidavits and papers submitted on this motion, and the very great difficulty of determining and ascertaining the truth, when evidence

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taken *ex parte* is so contradictory, the great need of so construing the statute, which specifies the evidence to be given by an attorney bringing an action of ejectment, of his authority to use the name of a plaintiff, as has been herein attempted, has been most forcibly impressed upon my judgment. Certain, it is, that the whole spirit and reason of the section, which has been commented upon, is in harmony with the construction given to it, and if, for technical reasons, already considered, it shall be eventually held that the one given is erroneous, then the suggestion of the need of further legislation upon the subject of the evidence of the retainer of an attorney by a client, is respectfully submitted. The present motion, to any one who reads the papers used therein, is a most convincing argument of such need. But leaving this digression, the consideration of the evidence of the retainer of Mr. Kneeland by Mr. Stewart will now be undertaken.

It is not claimed by Mr. Kneeland that there was any direct employment of him by Mr. Stewart, personally; the retainer, if at all, was through Mr. Clark H. Chapman, of Proctorsville, Vermont. Mr. Kneeland's line of proof is as follows: Seeing a letter published in the New York Herald of June 7, 1876, purporting to be from Alexander Stewart, he wrote, as he claims, June 9, 1876, to said Stewart, asking if he would permit him (Kneeland) to use his name, in company with those of other parties, to a proceeding to recover the estate. Mr. Stewart, it is said, showed this letter, his son, Robert G., being with him, to Mr. Chapman, and authorized such use of his name. It is further claimed that, upon several occasions between the year 1876 and that of 1878 (the suit not having been commenced until May 6, 1878), the said Alexander Stewart admitted to various parties the employment of both Chapman and Kneeland. It is further claimed that, July 12, 1878, Kneeland wrote to Mr. Chapman informing the latter that suit had been brought, and afterwards, on August 10, 1878, Kneeland again wrote to Mr. Chapman, inclosing a copy of the summons and complaint. Mr. Chapman then testifies

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that he read both letters, and the summons and complaint, to Mr. Stewart, who was pleased with what had been done, and ratified the same. Directed, as the line of proof is, to transactions and interviews before suit brought, and those occurring after it had been commenced, the same order will be observed in the discussion.

Did Kneeland write, on the 9th day of June, 1876, to the plaintiff, Alexander Stewart, for authority to use his name? The fact that he did so write is sought to be established by Abraham Gruber, the managing clerk of Mr. Kneeland, by Mr. Kneeland himself, by Mr. Chapman, who claims the letter was exhibited to him by Mr. Stewart and his son, Robert, by the letter of Chapman to Kneeland, of the date of July 6, 1876, in which the former says, "Mr. Alexander Stewart and his son, Robert G., have just brought me your letter of the ninth ultimo;" and by the affidavit of Mr. Henry H. Armsden, who declares a letter, purporting to be written by Kneeland to Stewart, was shown to him in August, 1876. In regard to the letter which Armsden saw, it should be observed that it is described in the affidavit as one that "purported to be in reply to one or more that had been written to said Kneeland from said Stewart, or some one that Stewart got to write for him," whilst the one, the existence of which is in dispute, was a volunteer letter from Kneeland to Stewart, suggested by the supposed publication of one from the latter to judge Hilton, which appeared in the New York Herald. On the other hand, Mr. Alexander Stewart, his wife, and the members of his family, deny the reception of any letter whatever from Kneeland. If such a letter had been sent, and received by Stewart, it is impossible to conceive that it would not have been the subject of conversation in his household; and if that letter had resulted in the formal authority to Chapman and Kneeland to commence an action in his name, then, when the letter of June 12, 1878, was sent by Kneeland to Chapman, and the extract therefrom, stating the commencement of the action, given to him (Stewart), and

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when, also, that of August 10, 1878, was received, inclosing the copy of summons and complaint, it is impossible to conceive that Mr. Stewart would be going from one man to another exhibiting the extracts from the letter, and the copy of summons and complaint, asking to have them read, and disclaiming all knowledge upon the subject. All this he undoubtedly did do, as is abundantly proved by the oaths of parties of unquestionable character. The evidence upon the point will be referred to hereafter in the discussion of the question, whether Stewart, after the action was commenced, formally assented to and adopted it? We are now dealing with the problem of an original employment in 1876; and, in solving that, it is not so important to determine whether Kneeland, on June 9, 1876, wrote to Stewart for authority to make him plaintiff in the suit to be brought as it is to ascertain whether Stewart gave the consent asked for. Granting, for the sake of argument, that Kneeland wrote the letter of June 9, 1876, and that Stewart received it, the important fact still remains to be affirmatively shown that Stewart gave to it a favorable response, one which would authorize not only an examination of his claims, but a formal power to enforce them by suit. In determining this point, we naturally turn to the letter of Chapman to Kneeland, of the date of July 6, 1876, claimed to be an answer, written at Stewart's request, to the communication of Kneeland of June 9, 1876. If Stewart intended fully to empower Kneeland to prosecute an action, would not that letter have so declared? Not a word of that kind does it contain. His relationship to the late Alexander T. Stewart is given, and he is several times styled "our client," but not a single word about the commencement of any action can be found therein. The expression "our client" could properly be used if a suit had not been determined upon, and the whole matter was under advisement. If we turn from the letter to Mr. Chapman's version of the interview, which produced it, as contained in his affidavit of September 27, 1878, the same absence of any direct author-

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ity to commence a suit is conspicuous. In that affidavit, after stating the call upon him by Stewart and his son, Robert, and the exhibition of the Kneeland letter, he thus states the interview: "They both wished me to answer Kneeland's letter; I listened to the old man's story, *and wrote it down from his lips*, in the letter to Kneeland, which is attached to his deposition herein, dated July 6, 1876, and marked exhibit E; he then said he wanted I should help him 'get his rights, in what he called 'a large property,' and said that if I would I should be well paid; after writing the letter, I made the following charge on my book: 'July 6, 1876, Robert G. Stewart and his father, debtor, to time and consultation and letter to Kneeland, \$1.00;'' from that time forward said Alexander has often talked with me about his claims as heir to the large estate, and was always inquiring how the matter was going on; I did not make any further charges against him; the next event in order was the letter of July 12, 1878." It will be remembered that the letter of July 6, 1876, is from a lawyer to a lawyer, and claimed to be written in response to one asking for power to do a specific act, and the affidavit is made by the writer of a letter who knows that the point in controversy is the direct authority to commence an action. If such authority was given it should have been given in plain words; and if intended to be expressed by the phrase "our client," the counsel failed so to say in the letter which he wrote, though therein, as he swears, he states "the old man's story as it fell from his lips," and in the affidavit which he has made. It is possible that Mr. Chapman so construed the interview of July 6, 1876, as to confer authority to bring an action; and he swears, in an affidavit of September 20, 1878, that he was often requested by Stewart "to direct S. F. Kneeland, an attorney of said city, to take such steps as he should see fit to procure his part of the property," but it is manifest, when we have a letter written July 6, 1876, which purports to give all that Mr. Stewart said, and a detailed ver-

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sion of that interview in a subsequent affidavit that no authority to commence an action was conferred. There was, if Chapman's statement is true, a general conference upon the matter, enough said to enable Chapman to speak of him as "our client," but no authorization of the use of a name as plaintiff in any suit or proceeding to be instituted. If there was some conversation about Stewart's right to a share in the estate of a New York merchant, held as early as the year 1876, in view of the flat denial by Stewart and all his family of any actual authority conferred to institute a suit, and more especially on account of the repeated declarations which he made to many persons after the suit was commenced, and at a date when he had not been brought in contact with judge Hilton, or any of his friends, that he had not authorized any, it is impossible for me to judicially hold that authority to bring an action was given prior to the institution thereof.

The next question is, has Alexander Stewart, since the suit was actually begun, adopted it as one authorized by him? The answer to this also depends largely upon the evidence of Mr. Chapman. The testimony on this point begins with a letter from Kneeland to Chapman, dated July 12, 1878, relating in part to private business between them, but also containing this clause: "Your client, Alexander Stewart, heads the list of plaintiffs in my partition suit against the Stewart estate. I don't know that he can be proved an heir, but his name makes him a convenient figure-head." Mr. Chapman says that he copied this extract from the letter, with a few additional lines, and that he "read this paragraph fully and clearly to him. He was delighted that the suit was going on, and said that if I would stick by him and get his rights I should be well paid." Mr. Stewart says, that when the extract was given him, "I took the writing home, and, being unable to read it, handed it to my daughter and she read it to me, and *I was mad*," &c. As to which is the more natural story, that he was "*delighted*" or "*mad*" on being called "*a convenient figure-head*," does not require much argument. Mary Stewart, the wife of Alex-

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ander, and Isabella Jeffs, a daughter, both testify, that when the extract was read at home, Mr. Stewart directly and flatly repudiated the suit; ex-governor Ryland Fletcher also deposes, "that in July last he" (Stewart) "showed me a paper which purported to be an extract of a letter from S. F. Kneeland to Clark H. Chapman, and said to me at the time that he knew nothing of this, I don't know what it means, I have received this paper from Chapman." Henry A. Fletcher, a son of the governor, testifies to a similar interview by Stewart with him on the same subject. Other witnesses also testify to similar statements. Upon this testimony, it is difficult to assume that Mr. Stewart approved the act, which the letter informed him of, and we now pass to the conduct of Stewart on the reception of the copy summons and complaint which was about a month later and in August, 1878.

Mr Chapman says: "I think I gave this complaint to Alexander Stewart personally. At all events, I saw him, while it was in his hands, read portions of it to him, and explained to him that it was a complaint in an action brought by the heirs to recover their interest in the Stewart estate in New York. * * * He was very much pleased that Kneeland had commenced and was pressing the suit." The delivery of these papers to him, and their explanation by Mr. Chapman, Mr. Stewart denies, and says: "Chapman gave it to my daughter, Mrs. Jeffs, on a Saturday, and Mrs. Jeffs took it to ex-governor Ryland Fletcher, and when she came home she told me the governor could not read it, and that he desired her to tell me to bring the paper with me the next day (Sunday), when his son would read it for me. The reason he could not then read it was because of the defect of his eyes from old age." Mr. Stewart then details his visit to governor Fletcher, the next day, and his interview with both the father and son; also one with a Mrs. Thompson, and her husband, a deputy sheriff, who read the papers to him. Mrs. Stewart and her daughter, Mrs. Jeffs, again confirm Mr. Stewart. That he visited ex-governor Fletcher and son

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to learn the contents of the papers is proven by both, and Mr. Samuel L. Thompson deposes to the fact that on "Sunday, August 18, 1878," Stewart called to see him and said, "Mr. Thompson, I wish you would read this; I have shown it to Isabella, and she couldn't read it at all, or make it all out." The witness then read the document, and after some conversation about the need of Stewart going to New York, Stewart further said, "I did not know anything about all this; what does it mean? I did not know anything about it, until Clark H. Chapman handed me this. I have here an extract written on a piece of paper which Chapman gave me." The witness then states the exhibition to him of the extract from the letter of July 12, 1878. Is not the weight of the evidence upon this point also against Mr. Chapman? If the summons and complaint had been fully explained, and Mr. Stewart satisfied and pleased, why did he seek information from so many and various persons; and why did he wish to employ and retain Mr. Walker as his counsel, as the latter swears he did? A party fully informed as to his rights, and satisfied with the counsel in whose hands he had reposed them, would not be seeking for information from his neighbors as to the contents of papers already explained and understood, nor be anxious to secure new legal talent at a heavy expense. Contradicted by Stewart, the wife and daughter, and by the events which there occurred, I am unprepared to hold that Mr. Stewart ratified and confirmed the suit. In reaching this conclusion all the evidence has not been adverted to. Reference has not been made to the evidence of Pryce Lewis, B. Gastin Jayne, Robert Filton, Mary Stewart, Isabella Jeffs and others stating admissions by both Kneeland and Chapman that they had not been employed, nor to that of William H. Walker, Bush, Johnson and others who testify to conversations with Stewart, in which, with more or less distinctness, he recognized an employment of Kneeland and Chapman for some purposes. It would be impossible, in an opinion which ought to be kept within rea-

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sonable limits, to discuss every particle of evidence contained in papers numerous and voluminous beyond precedent.

The leading points, as they seem to me, have been commented upon, and the conclusion of my own judgment is reasonably clear that whatever Mr. Chapman may have supposed was the extent of the power conferred upon him, and whatever conversations and talks may have been held about Alexander Stewart's rights as a supposed heir of Alexander T. Stewart, deceased, a suit in his name was never authorized, nor one brought, without his knowledge, ratified and adopted.

We are now brought to the last question which this motion presents, and that is, assuming an original employment of Kneeland and Chapman, has their conduct, in the management of the interests claimed to have been committed to their charge, been such as to justify the court in permitting Mr. Kneeland, the attorney who appears therein, to further occupy that position. It needs no authority to prove that the court has the power which is invoked. Its doors are open to all suitors who seek justice by honest and honorable means; but it cannot, and will not, allow its process and powers to be invoked either for dishonorable and unjust ends, nor its machinery kept in motion by dishonorable and unjust means. If the plaintiffs in this action have claims which they deem just and honest upon the Stewart estate, they may select their own attorneys to enforce them; but such attorneys, in their presentation, must not seek to impose upon the court, nor use its powers to accomplish their purposes by wicked or corrupt practices. If they do, the court, for its own honor and dignity, will, either on its own motion or at the instance of the party who employed the attorneys, remove them from charge of the action.

In considering the conduct of Mr. Kneeland in the management of the suit which he has instituted, the fact cannot be overlooked that he has willfully made a misstatement in the body of a complaint, which he has permitted one of the plaintiffs, Ann Jane Bailey, to verify. His own affidavit

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concedes that the residence of Alexander Stewart was stated as in Whitehall, in the state of New York, purposely to avoid a motion to compel security for costs. Probably the reason which induced the false statement was unsound in law, as Ann Jane Bailey, the co-plaintiff, was a resident of this state, but the false statement is very significant as to the methods which might be employed to carry the suit to a successful issue. Explain, as ingenious counsel have attempted to do, such conduct, the fact remains that an attorney of this court, charged with a most important suit, if it has any basis whatever, undertook to deceive his opponent and the court alike upon a matter which might, for certain purposes in the administration of justice, as he supposed, be material, and permitted his client to verify the complaint which contained the falsehood, by him knowingly inserted. For such an act as this, it would be entirely competent for the court to grant this motion. Though the attorney deemed his cause to be just, he had no right, by a willfully false statement of a fact in a pleading, to seek to attain any advantage whatever; and if the court should arrest his further procedure in the cause for that act alone, it would not be an unreasonable exercise of its power in behalf of its own dignity and the purity of its own officers. The act was plainly misconduct in his office as an attorney, for which Kneeland could be punished; and the adoption thereof by Mr. Chapman on its discovery, as his affidavit discloses he observed it, by not insisting upon the correction of the willful untruth, makes him a sharer in the guilt justly attached to it.

Passing, however, from the point just made, the good faith of the suit and the modes and methods relied upon for success will now be considered. In his letter to Kneeland, of July 6, 1876 (the first written, and the one claimed to be the authority for the suit), Mr. Chapman says: "I am inclined to think there may be something in it — this claim of our client to a consinship with the dead New Yorker. *But I very much doubt if the heirs can set aside the will.* And, yet, no mor-

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tal or divinity can *guess* what a N. Y. jury would do. A Detroit jury disagreed on the allowance of E. Ward's will (the Michigan millionaire), *and so forced a settlement*, by which the heirs got a slice, and it is possible the Manhattaners might go and do likewise." This letter is remarkable for its admissions. Mr. Chapman "very much" doubted if the will of Mr. Stewart could be broken. He did not believe in the justice of the suit which he claims he was authorized to empower Kneeland to bring, yet, relying upon the ignorance or prejudice of a jury of "Manhattaners," he thinks a disagreement "is *possible*" and thus a settlement may be "*forced*." Comment upon such confessions is useless. No standard of professional ethics yet established would justify a suit with such views of its integrity and such hopes of success.

It may be argued, however, that Mr. Kneeland entered upon the action with no such thoughts. Unfortunately, the evidence is very clear that he did. Mr. Robert Fitton, of Cavendish, in the county of Windsor, and state of Vermont, who, in April, 1878, was confided by Chapman with the collection or renewal of a note, held against Kneeland, testifies that he saw Kneeland in New York, and, after obtaining a new note from him, was intrusted by Kneeland with a message to Chapman. That message, to insure accuracy in its delivery, was written down by Fitton (its substantial accuracy is not denied by Kneeland), and it was in these words: "Tell Chapman that, in a few days, I shall be ready to move on the Stewart estate, and that there is money in it for him and me; that the Stewart estate did not want to be sued, and that judge Hilton would pay well not to be molested in his property, which he knew did not belong to him, and that every suit or move made him blue, and that all they had to do was to sue and see him squirm, and that he would pay well to get rid of a suit against the estate. He also told me to tell Mr. Chapman, to make the suit more secure, he would swear that Alexander Stewart's residence was in Whitehall, New York,

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instead of Proctorsville, Vermont, as it would be better to have it appear that Mr. Stewart was a New Yorker, and that by so doing they would not have to give security for costs." This message was communicated to Chapman, who very prudently requested Fitton to say nothing about it.

On July 12, 1878, Kneeland wrote to Chapman: "Your client, Alexander Stewart, heads the list of plaintiffs in my partition suit against the Stewart estate. I don't know that he can be proved an heir, but his name makes him a convenient figure-head."

From these letters and the verbal message, it is clear that both Kneeland and Chapman had no faith in the justice of their cause; their hopes were in the fears of their opponents, and a possible disagreement of a jury, which would *force* a settlement. About this there can be no mistake, as the evidence is furnished by themselves. Now, what next was done? Mr. Bryce Lewis, a New York detective, after considerable search, found Stewart and brought him to New York. This occurred early in September. Kneeland having learned from Chapman that Stewart was in care of Lewis, under the name of Brown, sought an interview, and succeeded. The result of this and subsequent interviews was a *bona fide* agreement, as Kneeland supposed, between Lewis and himself, by which the former agreed to aid in procuring a settlement of the suit for the sum of \$100,000, for which service, by writing, dated September 5, 1878, Mr. Kneeland pledged his "sacred honor as a gentleman," and his "hopes for eternity," that, to use his exact language, "I will pay Bryce Lewis one-tenth of all the moneys I shall make out of it, as soon as the same is received by me." In a letter to Chapman, dated September 6, 1878, and purporting to be "written in haste," Mr. Kneeland informs him of this transaction thus: "Lewis is a detective, and I have bought him over. He will go back with Stewart, probably on Monday night. * * * I have made arrangements with Lewis to give him a certain per cent on all I make under any settlement perfected within three months; and I

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have got him to be a detective on me, as well as Stewart, eking out the things I want to have the other side know." A step had now been taken to consummate the original plan, which was to force a compromise. The employe of Hilton had been "bought * * * over," and he was to pretend to be a detective on Kneeland, and his business was to aid Kneeland in the compromise by, among other ways, "eking out the things" that Kneeland wanted "to have the other side know." To characterize this by no unnecessarily harsh epithets, it will be sufficient to say, of this method of prosecuting a lawsuit, that it was more novel and unprofessional than ingenious. It disarmed Mr. Chapman of all suspicions; and when Messrs. Bryce Lewis and B. Gastin Jayne visited Mr. Chapman, at Proctorsville, for the object, at first professed to Chapman, of devising the machinery to force the settlement, he freely confessed his disbelief in the justice of the suit, the want of authority to commence it, and, thereupon, being confronted with the evidence of his confessed guilt of an attempt wrongfully to extort money, and being requested to choose between the position of "defendant or witness," chose the latter, and, on the demand of Jayne and Lewis, surrendered the Kneeland letters. Having given up the letters of Kneeland to parties employed as detectives, of which he had full knowledge, the letter of Chapman to Kneeland, announcing the act, and justifying it on the ground that Lewis wanted them, and, to use his own language, because "you say, in yours of the sixth, I can trust him fully," is certainly a grim sarcasm. The fact has not been overlooked that Chapman undertakes to vary the events of these interviews somewhat. He does admit, however, that, in the final one, Jayne's language was threatening, and he said, among other things, "you are liable to indictment, and have got to take your position either as defendant or witness. All we want of you is to give up the letters that Kneeland has written to you in the last few weeks; Kneeland is ruined any way." A lawyer of the age of fifty-six years, who has

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filled important public offices, conscious of no guilt, could not, under such language, have made any concessions. The delivery of the letters thereon stamp the story of Jayne and Lewis as true. By force of admissions made to them, as they have testified to, could the delivery of the letters only have been accomplished.

The result of this evidence, which has been briefly sketched, is clear. Both Chapman and Kneeland more than doubted the justice of their cause. The action was commenced with a falsehood willfully inserted in the first pleading; their hope of success was in a forced settlement; a detective in the service of their adversaries was "bought over," as they supposed, to their interest, and by his treachery, as they hoped, the fears of parties interested in upholding the will of the dead New York merchant were to be so worked upon as to secure \$100,000. This plan was not only embodied in letters and messages, but plainly confessed to their supposed instruments; and the question now presented is, conceding a full employment by Stewart to bring the action, conceding an honest belief in counsel of its righteousness and justice, can this court—the highest in the state, of original jurisdiction—tolerate such modes and methods to success? To this there can be only one answer, and that is, that the attorney who thus seeks to carry on a litigation should be stopped by its mandate; when, however, a cause, in the justice of which counsel have no faith, is carried on by such means as have been confessedly employed in this, the answer should be, if possible, more emphatic. Mr. Kneeland's functions, as the attorney for Mr. Stewart, at least, must terminate. More than this it is unnecessary, if we had the heart to do so, to say; but to say less is forbidden by every consideration of self-respect, and a due regard for professional honor.

The order of the special term must be one granting the motion, and any further action is submitted to the general term.

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SUPREME COURT.

DANIEL CRILL agt. MARTIN KORNMEYER.

Supplementary proceedings — right of assignee to maintain — jurisdiction of county judge.

An assignee of a judgment has the right to maintain supplementary proceedings on it, after the death of the party recovering the judgment.

Where it appeared that the owner of the judgment was B., and that it was assigned to him by the plaintiff in his lifetime, it also appearing that the plaintiff in the action was dead:

Held, that the court could appoint a receiver of the property of the defendant on the application of the assignee.

A county judge has jurisdiction in proceedings supplementary to execution based on judgments recovered in the supreme court where the judgment debtor resides or has a place of business in the county, or where a transcript has been filed when the judgment was not recovered in that county.

At Chambers, Utica, September, 1878.

R. O. JONES, *Special County Judge of Oneida County.*—

An application is made to me, in this matter, for the appointment of a receiver of the property of the defendant. It appears that the owner of the judgment is M. M. Burlison, Esq., and that it was assigned to him by the plaintiff in his lifetime. It also appears that the plaintiff in the action is now dead. The important question now presented is, whether or not I have the power to appoint a receiver, the plaintiff being dead? Prior to the adoption of the Code of Procedure, execution could not be issued on any judgment, where the party recovering the judgment was dead, except through the aid of the writ of *scire facias* (*Jay agt. Martine, 2 Duer,*

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654; *Wheeler* agt. *Dakin*, 18 *How. Pr. R.*, 537 and cases there referred to).

Section 283 of the Code of Procedure, as amended in 1866, gave the right to execution, and professed to give the right to supplementary proceedings, in favor of the personal representatives, duly appointed, of a deceased party who had recovered judgment, at any time within five years after the entry of the judgment. That section did not give the right to an assignee of the judgment. That section was repealed by chapter 417 of the Laws of 1877.

The only provision touching upon the subject, which I have been able to find in the Code of Civil Procedure, is section 1376. That, however, only covers executions in cases of deceased parties who had recovered judgments in their lifetime. That extends the right to execution at any time within five years after the entry of judgment, as well to the *assignees* of the judgment, as to the personal representatives duly appointed of the deceased creditors. There is no statute which in express terms, gives the right to *assignees* of deceased persons, who in their lifetime had recovered judgments, to supplementary proceedings against the judgment debtor. There is none which in express terms gives the right to the *assignee* of a living party who recovered judgment; yet the courts have held that assignees of the judgment had the right to the remedy given by proceedings supplemental to execution (*See Ross* agt. *Clusman*, 1 *Code Rep. [N. S.]*, 91; *Same case*, 3 *Sandf.*, 676; *Hough* agt. *Kohlin*, 1 *Code Rep. [N. S.]*, 232; *Lindsay* agt. *Sherman*, 1 *Code Rep. [N. S.]*, 25; *Same case*, 5 *How. Pr. R.*, 308; *Orr's Case*, 2 *Abb. Pr. R.*, 457; *Frederick* agt. *Decker*, 18 *How. Pr. R.*, 96).

The case of *Ross* agt. *Clusman* (*ante*) is the pioneer case on the right of an assignee of a judgment to a resort to supplementary proceedings.

The language of section 292 of the Code of Procedure is, the "*judgment creditor*" is "entitled to the order," &c.

Judge SANDFORD, in giving the opinion of the court in

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Ross agt. *Clusman*, in speaking of the objection there made to an assignee having the benefit of the proceeding, says: "We think this objection is wholly unfounded. The judgment creditor is the person who owns the judgment, to whom it is due, and who alone has the right to receive it and to give a discharge; not the person in whose name the judgment was recovered, but who has transferred it and thereby ceased to be a creditor of the defendant. We suppose that one to whom a bond has been assigned is, beyond all doubt, the bond creditor, and that no one would think of calling the obligee the bond creditor after he had parted with his interest in the debt by an absolute assignment."

I think judge SANDFORD's construction or definition of the words "*the judgment creditor*" correct. Applying, then, to this case that construction of the two hundred and ninety-second section of the Code of Procedure, it is established that were it not for the death of the plaintiff herein, Mr. Burlison, the assignee of the judgment, would now be entitled to his receiver. Does the death of the plaintiff defeat it? I think not. It may be said that supplementary proceedings being a proceeding in an action, there is no longer any plaintiff or defendant, as the case may be, to carry it on in the name of. I have searched in vain for a case holding it to be necessary to carry the same on in the name of the plaintiff or defendant. The cases do hold that it is not improper to carry on the proceeding in the name of the plaintiff or defendant recovering the judgment; and what the courts mean in those cases I suppose is, that it is not improper to entitle the affidavits and orders in the action, as the other papers in the action are entitled. I think the courts were right in so holding; I yet, however, have to learn that it is imperative to have the affidavits or orders in supplementary proceedings entitled in any action or in any form. I think, it sufficient that they, in the body of them, indicate sufficiently what proceeding they are made in; that, I think, disposes of such objection. The reason that executions (except in cases

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expressly authorized by statute), must be issued in the name and lifetime of the party recovering the judgment, I think does not obtain in proceedings supplemental to execution. The statute does not give an assignee of a judgment the right to an execution which, upon the face thereof, shall be in his favor. He, of course, may make an arrangement for the issuing of one, with the person recovering the judgment (the assignor), and they may dispose of the money collected on it, as between themselves, as they please. The execution, however, must, upon its face, be in favor of the party recovering the judgment. It would seem a little strange at least, then, after the decease of the party recovering the judgment, to see him issuing executions and attending to collections on them.

That is probably a sufficient reason for the rule stated, with reference to executions, where the persons recovering the judgments are dead. That reasoning cannot be applied to supplementary proceedings, for the reason that the statute has given the remedy by them to "*judgment creditors*."

The language of the statute is equivalent to its saying, that the party in whose favor the judgment was recovered, his assignee or assignees is and are entitled to the use of proceedings supplemental to execution. It may also be urged, that by the same process of reasoning, you are to conclude that the personal representatives duly appointed of deceased persons, in whose favor judgments existed at their decease, are entitled to the remedy; and if they are, the question will be suggested, why did the legislature amend section 283 of the Code of Procedure, in 1866, so that it in terms assumed to give the right to supplementary proceedings to the personal representatives duly appointed of such deceased persons?

I shall not discuss that proposition at any great length, nor will I formally pass upon it, but will content myself with making a few suggestions with reference to the same.

Unless the language of section 292 of the Code of Procedure failed to embrace the personal representatives duly appointed of the deceased party, in whose favor the judgment

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had been recovered, it was unnecessary to have such amendment passed to confer such power or authority, a power or right which must be already existing if section 292 was broad enough to confer it on them; but its effect, if not intention, may have been to limit the right to that class of persons to five years after the entry of the judgment. It will not do to say such and such was the intent of the legislature unless, upon a fair construction of the language used, the same is so expressed.

Saying a case is within or not within the spirit of an enactment will not do unless a fair construction of the language used will or will not, as the case may be, bring it within the enactment itself (*Lobdell agt. Lobdell*, 36 N. Y., 327-334).

It may be urged that, through the decease of the party who had recovered the judgment and who owned it at the time of his decease, there is a suspension of the right to the remedy by supplementary proceedings until the due appointment of the personal representatives, and for that reason the personal representatives duly appointed were not entitled to it until the amendment of 1866 to section 283 was passed.

This may be a fair test of that question: Supposing a person recovering a judgment was convicted of a felony and sentenced to state prison for a term of years that would suspend his right to institute the proceeding (*sec. 39, vol. 3, Revised Statutes, page 994 [Banks Bros. 6th ed.]*); yet, after his sentence was served and his discharge from prison, no one, I apprehend, would claim that such suspension had destroyed his right to his remedy for the collection of the judgment by supplementary proceedings. Wherein is the difference in respect to the two cases; are the personal representatives, duly appointed, not the judgment creditors within the true meaning of section 292 of the Code of Procedure; are they not the persons who own the judgment, to whom it is due, and who alone have the right to receive the amount due on it and discharge it?

If that does not make them "*judgment creditors*" within

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the meaning of the section, what will? If they sue it over they will only hold it in a representative capacity, which they do without suing it over, and their power over it will not be increased. Without formally passing upon the rights of personal representatives duly appointed as to proceedings of this character, I must hold that Mr. Burlison, the assignee of the judgment, is entitled to an order appointing a receiver of the property of the judgment debtor herein.

Ordered accordingly.

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SUPREME COURT.

HENRY LUERS and others as trustees and administrators, with the will annexed, of HENRY LUERS, deceased, agt. PETER BRUNGES and others.

Administrator, with the will annexed — to what property and rights he succeeds.

The title of an administrator, *de bonis non*, with the will annexed, relates back to the death of the testator, and he may recover not only upon causes of action in favor of the testator in his lifetime, but also for causes of action arising after his death in regard to the assets.

Walton agt. Walton (4 Abb. Ct. App. Dec., 512) applied.

By operation of law, not only the unadministered assets of the testator in specie, in the hands of the executor or others, pass to the administrator, *de bonis non*, with the will annexed, but also the moneys and securities realized on any sale thereof by the executor, for the purpose of further administration, which have not lost their identity, and can be distinguished from the individual property of the executor.

Where a bond and mortgage were executed and delivered to F. and B., as executors of the last will and testament of L., deceased, the principal sum secured thereby being made payable to F. and B., *as executors, their survivors, successors or assigns*:

Held, upon demurrer to the complaint, that, upon the removal of F. and B. from their office as executors, and letters of administration, *de bonis non*, with the will annexed, having been issued, by operation of law, the bond and mortgage passed to the administrator, with the will annexed, and that he could maintain an action for the foreclosure of the same.

The plaintiff, in his complaint, claims that the principal sum secured by the mortgage, with installments of interest, were due and unpaid, but failed to state facts showing the principal to be due.

Held, upon demurrer, that the action of foreclosure could be sustained for the non-payment of interest.

Special Term, October, 1878.

DEMURRER to complaint.

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The action is for the foreclosure of a mortgage. The complaint alleges that Henry Luers died on the third day of January, 1865, leaving a last will and testament, which was admitted to probate by the surrogate of the county of New York, by which will Lawson N. Fuller, and Peter Brunges, were appointed executors thereof; that upon the 8th day of March, 1865, letters testamentary were granted and issued to Fuller and Brunges, as executors, and that they entered upon the duty of their office.

That the defendants Brunges and Ockershausen, for the purpose of securing the payment to said Fuller and Brunges, as executors, of the last will and testament of Henry Luers, deceased, of the sum of \$38,000 with interest, executed and delivered on the first day of May 1875 to them as executors, a bond dated on that day, conditioned for the payment of the sum above mentioned in five years from the date of the bond, to them the said Fuller and Brunges, as executors as aforesaid, their survivor, successors or assigns, and as collateral security to the bond, executed and delivered to the said Fuller and Brunges as executors of the last will and testament of said Luers, deceased, a mortgage upon real estate situated in the city of New York, which mortgage contained the same condition as the bond; and in case of default in the payment of the aforesaid sum of money or the interest that might grow due thereon, or any part thereof, the said Fuller and Brunges, as executors as aforesaid, their survivor, successors and assigns, were empowered to sell the mortgaged premises in due form of law, and out of the moneys arising from the sale, to pay the said sum of money, with the costs and expenses, the surplus to be returned to said Brunges and Ockershausen.

That the letters testamentary issued to Fuller and Brunges, were revoked by an order of the surrogate of the county of New York, made on the third day of March, 1877, and that on or about the eighteenth day of May, 1877, letters of administration, with the will annexed, were duly issued by the surrogate of New York to the plaintiffs in this action, and

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that thereupon the plaintiffs duly qualified as such administrators and entered upon the discharge of the duties of their said office. That by operation of law the title and ownership of said bond and mortgage, and the fund thereby secured, or intended to be secured, vested in the plaintiffs.

The complaint alleges that the defendants have failed to comply with the condition of the bond and mortgage by omitting to pay the sum of \$1,330 interest upon the principal of said bond, which became due and payable on the 1st day of November, 1877, and by omitting to pay the other interest which has become due and payable since that date; that the defendants have failed to comply with the conditions of the bond and mortgage by omitting to pay the principal thereof, which became due and payable on the default in the interest expressed in said bond; and that the plaintiffs elect to consider the whole of said principal sum, with the interest thereon, due and payable according to the provisions of the bond and mortgage, and that there is now justly due upon the same the sum of \$38,000, with interest thereon from the 1st of May, 1877. The complaint also avers that, by an order of the supreme court, made on the 25th of April, 1878, Brunges and Fuller were removed from being trustees of the trusts under the will of Luers, and that the plaintiffs were appointed as such trustees in their place, and have qualified and entered upon the discharge of their duties as such. Although not given in the exact order in which they are stated therein, such are the substantial allegations of the complaint. Judgment of foreclosure and sale of the mortgaged premises is demanded. The defendants, Brunges and Ockershausen, separately demur to the complaint, and assign for their causes of demurrer:

First. That it appears upon the face of the complaint that the plaintiffs have not legal capacity to sue; in that the complaint does not show or allege any conveyance or assignment by the former executors and trustees of their right, title and interest in and to the bond and mortgage, and that they are not the lawful owners and holders thereof.

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Second. That it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action against the defendants.

George F. Martins, for defendant Brunges, and *H. Seacor, Jr.*, for defendant Ockershausen, for demurrer.

Elliott F. Shepard, for plaintiffs, opposed.

VAN VORST, J. — If the fact was that the mortgage in question was among the assets of the testator, in specie, there can be no question but that by operation of law the plaintiffs, who have been appointed administrators, *de bonis non*, with the will annexed, have a legal title thereto.

By their appointment, in the room of the executors named in the will who have been removed, the plaintiffs became the sole representatives of the estate and are charged with the administration of the assets not already administered. Their title dates from the death of the testator, and they may recover not only upon causes of action in favor of the deceased in his lifetime, but equally for any cause of action after his death in regard to the assets (*Redfield on Wills*, vol. 3, 103). An administrator, *cum testamento annexo*, has the same rights and powers, and is subject to the same duties, as if he had been named executor in the will. He takes all the powers, as well as the rights and duties, which belong to the executor as such, whether these powers are conferred by statute or exist at common law (*Conklin agt. Egerton's Administrator*, 21 Wend., 430; 2 Rev. Stat., 16, sec. 22 [2d ed.]).

In *Walton agt. Walton* (4 Abb. Court of Appeals Decisions, pp. 512, 516) it is said: "For all legal purposes the plaintiff" (who was administrator, *de bonis*, with the will annexed) "is the sole legal representative and possessed of the unadministered assets of the deceased and is entitled by law to the custody of the property and the possession of the assets for the purpose of administration. He may bring suits to recover

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the property against any person in possession of it" (*See, also, Redfield on Wills, vol. 3, 101; Williams on Executors, vol. 1, 823*).

Although it does not appear that the mortgage sought to be foreclosed did, in specie, belong to the decedent, yet, for the purposes of this demurrer, sufficient is alleged to show that it was taken and held by the executors as an asset and as the property of the estate of the decedent. That it is such asset and is the property of the estate, the obligors and mortgagors, upon the undisputed facts, are precluded from now denying, in so far as the issue of law raised by the demurrer is concerned.

The complaint alleges that the bond and mortgage were executed and delivered to secure the payment to Fuller and Brunges, as executors of the last will and testament of Henry Luers, deceased, the sum secured thereby, and that the same was to be paid to them and their successors.

Persons are presumed to mean what they say, and we are not warranted in giving an import to words opposed to the sense in which they were manifestly used. This is emphatically so when they speak through an instrument under seal. The language of the mortgage, impresses it with a special and limited character as to the fund it represents and the direction in which it is to go.

Although, in fact, given to secure a debt due to the estate, had the mortgage been executed to Fuller and Brunges, individually, and not in their representative character, other questions would have arisen.

But Brunges, one of the obligors and mortgagors, was himself an executor. As far as he is concerned, the bond and mortgage was executed by him, individually, to himself, as executor; and such act amounts to a distinct assertion, on his part, that the security so taken was the property of the estate he represented. But both are equally bound by the facts stated in the bond and mortgage, and appearing in the complaint.

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Fair construction would be against any claim on the part of the mortgagees, should any such be interposed, that the bond and mortgage were their individual property.

There is no room, therefore, at this time, for the conclusion that the mortgage is not the property of the estate; and if such be its character, the plaintiffs are legally and equitably entitled to its possession in right of their office as administrators, with the will annexed.

In *Walton* agt. *Walton* (*supra*), it is decided "that the administrator, *de bonis non*, may recover the property of any person in possession of it, if it exists in specie, in the condition in which it was at the testator's death, or if it has been converted into money."

The opinion in that case adds: "Wherever they are found, in whose hands soever they may be, such person is bound to deliver them over into the possession of the plaintiffs."

In the case of *Walton* agt. *Walton*, among other things, real estate, bid in by the former executor on a mortgage executed to the testator, was held to be a purchase for the estate, and that the representatives had the right to elect to take the purchase.

And, in general, I should say, that not only the unadministered property of the testator in specie would, by operation of law, pass to the administrator, *de bonis non*, with the will annexed, but also the moneys and securities realized on a sale thereof for the purpose of further administration, and yet not fully administered, and which have not lost their identity, and can be distinguished from the individual property of the executor, will also so pass.

We are not shut up to any presumption, in the entire absence of facts, that in taking the bond and mortgage, the executors were doing an unauthorized act, or that they have intentionally converted to their own individual use, the property of the estate, but, on the other hand, the presumption is, that they were legally and honestly taken in a transaction affect-

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ing the estate, and that they were properly made and executed to the executors as such.

And this action is an election on the part of the plaintiffs to take the bond and mortgage, although executed after the testator's death, as assets to be fully administered under the will.

And they are justified in so taking them, as representing a debt due to the estate, or as property of the estate, invested and legally converted into that form, and which in their converted form, are readily distinguishable. It is quite true that there are difficulties which seem to lie in the way of regarding the plaintiffs as succeeding to the bond and mortgage, made after the death of the testator, growing out of the rule advanced in several reported cases, that the administrator, with the will annexed, derives his title from the decedent and not from the executors who have been removed (*Carrick agt. Carrick*, 23 N. J. Eq., 364; *Com. For. Missions*, 27 Conn. R., 344). But this difficulty, under the facts before us, is unsubstantial. There exists in this case, a privity between the plaintiffs and the executors, whom they succeed, as to all rights and duties, growing out of the character impressed upon the bond and mortgage by their language, and the purpose for which they were evidently taken.

This is an action in equity. An equitable title is sufficient to uphold it. The demurrer admits, in substance, that the bond and mortgage are the property of the estate, and that the amount thereof is properly payable to the mortgagees, as executors, and to their successors.

In this connection the word "successors" is quite important, and, in itself, repels the idea suggested by the defendant's counsel that an assignment from the executors was necessary to vest the property in the plaintiffs.

The obligations, by their terms, determine the rights of the plaintiffs to hold and enforce their payment.

Where the cause of action is such that the first administrator may sue in his representative character, the right of

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action devolves on the administrator, *de bonis non* (*Catherwood* agt. *Chaubaud*, 1 *B. & C.*, 150); wherever the money recovered will be assets, the executor may sue for it and declare in his representative character (*Webster* agt. *Spencer*, 3 *B. & Ald.*, 362-364; *Smith* agt. *Pearce*, 2 *Swan* [*Tenn.*], 127; *Burrus* agt. *Roulhae*, 2 *Bush* [*Ky.*], 39).

What is said in the complaint about the plaintiff having been also appointed trustee under the will of the testator in the place of the trustees removed, is immaterial. The nature of the trusts is not disclosed. It does not appear that the bond and mortgage in question form a part of any trust estate. They were not executed to the trustees but to the executors as such.

It must be decided, therefore, that the first ground of demurrer is not well taken, and that if there be any fact which disentitles the plaintiffs to recover they must be interposed by answer.

In support of the second ground of demurrer it is urged that it does not appear that the principal sum secured by the mortgage is due. Whether or not the whole amount is due will depend upon the condition written in the bond.

The condition is not in terms given in the complaint, but a conclusion is drawn by the pleader therefrom as though it was fully stated.

But the complaint alleges the interest to be in arrears and unpaid from the 1st day of November, 1877. That is sufficient to uphold this action for a foreclosure of the mortgage.

On the trial, when the bond is offered in evidence, the extent of the relief to which the plaintiffs are entitled will be determined. There must be judgment for the plaintiffs on the demurrer, with liberty to the defendants to answer on payment of costs.

Matter of Pilsbury.

SUPREME COURT.

In the Matter of the Application for an attachment against
LOUIS D. PILSBURY.

Attachment—to compel superintendent of the Albany penitentiary to give evidence before a committee consisting of five supervisors of the county of Albany and the mayor and recorder of the city of Albany—when application for, will be denied.

Chapter 152 Laws of 1844 provides for the construction of a penitentiary in the county of Albany. Section 4 provides: "The management and direction of said penitentiary, when completed, shall be under the control and authority of the said board of supervisors and the said mayor and recorder of the city of Albany, who are hereby authorized and empowered, by their votes in joint meeting, to establish and adopt rules for the regulation and discipline of said penitentiary, to appoint officers to take charge thereof, to fix their compensation and prescribe their duties and generally to make all such by-laws and ordinances, in relation to the management and government thereof, as they shall deem expedient." At a joint meeting * * * "of the board of supervisors of the county of Albany and the mayor and recorder of the city of Albany, a committee, consisting of five supervisors and the mayor and recorder aforesaid, were charged with an investigation into the effects and consequences of convict labor in the penitentiary, and, to that end, to send for persons and papers, to take evidence under oath and * * * to report to this board the result of their labors, together with such recommendations as the inquiry may commend to their judgment, at as early a day as practicable." The application for attachment against the superintendent of the Albany penitentiary to compel him to give evidence and produce his books and papers before such committee, he having refused so to do, is made upon certain provisions of the Revised Statutes (pages 879, 880 of vol. 1, 6th edition), sections 44, 45, 46, 47 and 48 providing for the examination, by the board of supervisors, of any county, of any officer of the county or any person or witness upon any subject or matter within the jurisdiction of said board:

Held, first, that the witness was not required to attend either by or before the board of supervisors, or by or before any committee of such board.

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The committee, before which the witness was summoned, was not appointed by the board of supervisors, when convened as such, but was one appointed by "the board of supervisors of the county of Albany and the mayor and recorder of the city of Albany, in joint meeting," assembled. The application must fail because no committee of *the board of supervisors*, appointed by *the board*, nor any committee consisting of *supervisors only*, appointed at a joint meeting, or anywhere, has required the witness' attendance before it.

Second. Even if the committee, appointed "in joint meeting," or the supervisors alone who formed a majority of it, could be called a committee of the *board of supervisors*, and the right to summon the witness be founded upon the clause in the section of the statute (1 R. S. [6th ed.], p. 879, sec. 44), which provides for his examination "upon any subject or matter within the jurisdiction of such board," the application for the attachment must be denied, for the reason that section 4 of chapter 153 of the Laws of 1844 places "the management and direction of the said penitentiary, when completed, * * * under the control and authority of the said board of supervisors and the said mayor and recorder of the city of Albany;" and, therefore, the "subject or matter" is not "within the jurisdiction of such board" of supervisors.

Third. He cannot be examined under the clause of section 44, giving the board of supervisors or its committee the right to examine "any officer of the county" as he is no county officer.

Fourth. Nor can he be compelled, under section 44, to produce "any book, account, voucher or document" which such committee may need as "relating to the affairs or interests of such county." Such book, account, voucher or document "must relate" to the affairs or interests of such county. Although, in some sense, the documents sought might be considered as relating "to the affairs or interests" of the county of Albany, yet the better and safer construction *seems* to be, that the limits upon the oral testimony apply to the written, and that the "*affairs or interests*" spoken of are those over which the *board of supervisors*, as such, exercise control. The subject (*convict labor in prisons*) the board of supervisors, *as such*, have no control over.

Held, further, that the application for an attachment against the superintendent of the Albany penitentiary cannot be granted, for the reason that he has not been subpoenaed by or before any board of supervisors, or by or before any committee of such board, and also because even though the committee summoning him could be called a committee of the board of supervisors, a case is not made out under the statute.

Quere. Can the legislature confer upon the board of supervisors, or a committee thereof, such general and sweeping powers as the statute in words seeks to confer?

Albany Special Term, September, 1878.

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APPLICATION to Mr. justice WESTBROOK for an attachment against Louis D. Pilsbury, the superintendent of the Albany penitentiary, to compel him to give evidence before a committee, consisting of five supervisors of the county of Albany, and the mayor and recorder of the city of Albany, appointed at and in a joint meeting of the board of supervisors of the county of Albany and the mayor and the recorder of the city of Albany.

N. P. Hinman, for the application.

Henry Smith and *Wm. A. Young*, for Mr. Pilsbury.

WESTBROOK, J.—Chapter 152 of the Laws of 1844 provides for the construction of a penitentiary in the county of Albany. By section 1 of said act, the board of supervisors of such county are charged with the erection of the building. By its second section commissioners were appointed to select a site for the building, and within six months from the passage of the act “to report such location, together with a detailed plan for the construction, management and discipline of the said penitentiary, and an estimate of the expense of the land for the site and of the construction thereof to the said board of supervisors.” By the third section of the act, the board of supervisors with the mayor and the recorder of the city of Albany were to act upon the said report, with full power to “alter, modify, reduce or increase the site, plan or expense of construction of said penitentiary as specified in the said report, in any manner as to them shall seem fit, expedient or necessary.” The commissioners are then charged with the duty of selecting the site and constructing the building according to the directions given by the board of supervisors and said mayor and recorder. In case, however, the board of supervisors, mayor and recorder failed to approve of any plan for the erection thereof then the commissioners were charged with the duty of erecting the building according to the plan which they

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might adopt. The fifth section provides for the borrowing of money by the board of supervisors to carry out the objects of the act.

The foregoing synopsis of the provisions of the act is given to show in what manner the penitentiary was built. As the fourth section is one upon which the result of this application largely depends, it is worthy of separate and independent statement. That section provides: "The management and direction of the said penitentiary, when completed, shall be under the control and authority of the said board of supervisors, and the said mayor and recorder of the city of Albany, who are hereby authorized and empowered, by their votes in joint meeting, to establish and adopt rules for the regulation and discipline of said penitentiary, to appoint officers to take charge thereof, to fix their compensation and prescribe their duties and generally to make all such by-laws and ordinances, in relation to the management and government thereof, as they shall deem expedient."

At a joint meeting * * * "of the board of supervisors of the county of Albany, and the mayor and recorder of the city of Albany," as the subpoena served, and for noncompliance with which an attachment is asked for, expressly states, a committee consisting of five supervisors, and the mayor and recorder aforesaid, were charged with an investigation into the effects and consequences of convict labor in the penitentiary, and to that end "to send for persons and papers, to take evidence under oath, and * * * to report to this board the result of their labors, together with such recommendations as the inquiry may commend to their judgment, at as early a day as practicable."

Mr. Louis D. Pilsbury, the superintendent of the penitentiary, was summoned to appear before this committee "to give such information touching the subject of inquiry as may be in your" (his) "possession," and was further required to bring with him "before said committee all books of account, contracts, papers, and other documents in his custody in

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anywise relating to or that may be required in the investigation of the subject embraced in the preamble, resolutions and motion adopted by said board." Mr. Pilsbury, after undergoing a partial examination, by the advice of counsel, denied the power of the committee to make the investigation, and refused to answer questions, or to produce books and papers. On proof of these facts, application is made to me, as a justice of the supreme court, to issue an attachment against said Pilsbury to compel his attendance before said committee.

The application is made upon certain provisions of the Revised Statutes, which will be found on pages 879, 880, of volume 1, sixth edition, sections 44, 45, 46, 47 and 48. The forty-fourth section provides: "Whenever the board of supervisors of any county shall deem it necessary or important to examine any person or a witness upon any subject or matter within the jurisdiction of said board, or to examine any officer of the county, in relation to the discharge of his official duties, or to the receipt or disposition by him of any moneys, or concerning the possession or disbursement by him of any property belonging to the county, or to use, inspect or examine any book, account, voucher or document in the possession of such officer or other person, or under his control, relating to the affairs or interests of such county, the chairman or president of such board shall issue a subpoena in proper form, commanding such person or officer to appear before such board at a time and place therein specified, to be examined as a witness; and such subpoena may contain a clause requiring such person or officer to produce on such examination all books, papers and documents in his possession or under his control, relating to the affairs or interests of the county."

Provision is then made, by section 45, for the service of the subpoena; by section 46, for the exercise of the power conferred upon the board of supervisors by section 44, upon a committee of such board; and by section 47, in case the party subpoenaed shall not obey the process issued, for a

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report "of the facts to the county judge, or to a judge of the supreme court, or of the court of common pleas of any of the cities of the state, who shall thereupon issue an attachment in the form usual in the court in which he shall be judge, directed to the sheriff of the county where such witness was required to appear and testify, commanding the sheriff to attach such person, and bring him before the judge by whose order such attachment was issued." Provision is then made by subsequent sections for proceedings upon the return of the attachment, but as these are of no consequence upon this application, a particular statement of their contents is not made.

In the examination of the question submitted—the right to attach Mr. Pilsbury for refusing to obey the subpoena—it will be remembered that the power of the court in a proper action to compel the attendance of a witness, and the production by him of books and papers, is not before me. The simple point is, have I, as a judge of the supreme court, under the statute referred to, upon the present application, any such power? It should also be observed that the party summoned must have been required to attend either by and before the board of supervisors of a county, or by and before a committee of such board. The matter, also, upon which the witness is to be summoned must be "within the jurisdiction of such board," or he must be an "officer of the county." And lastly "such officer or other person" may be required to produce "any book, account, voucher or document * * * relating to the affairs or interests of such county." Is the present application within these provisions? I think not, and for the following reasons:

First. The witness was not required to attend either by or before the board of supervisors, or by or before any committee of such board. The committee before which Mr. Pilsbury was summoned, was not appointed by the board of supervisors when convened as such, but was one, as the subpoena served, and the petition presented to me show, appointed by "the

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board of supervisors of the county of Albany, and the mayor and recorder of the city of Albany in joint meeting" assembled. The separate meeting and organization of the board of supervisors could not be preserved, when assembled in "joint meeting" with other officers. A new body was thereby formed, just as much so, as when the members of the senate of the state, and the judges of the court of appeals assemble themselves together to make a "court for the trial of impeachments." The supervisors and the mayor and recorder were convened in joint meeting, to act upon matters, over which neither, when comprising a separate body, had jurisdiction (as will presently be shown), and consequently by no form of words could there be a committee of the board of supervisors selected thereat. The declaration embodied in the resolution of appointment, which was adopted "in joint meeting," to the effect "that a committee of five members of this board, together with the mayor and recorder be appointed," could not possibly make such five a committee of the board of supervisors, even though that was its purpose, because it was not selected by such board when professing to be organized as such. As well might a majority of a committee, when selected by senators and judges convened as a court of impeachment, be called a senate committee, because the form of the resolution appointing it declared, "that a committee of five members of this senate, together with the chief judge and one associate judge of the court of appeals be appointed," etc. It could not be a senate committee because it was not chosen by the senate convened as such, and also because, in words, it does not profess to choose a senate committee, but a committee composed of five senators and two judges. Precisely this argument applies to the case before us. The board of supervisors was not assembled as a board, but its individual members were assembled with other officials "in joint meeting." Such joint meeting appointed "a committee," and in its make up it was to consist "of five members of this board," *i. e.*, board of supervisors, "together

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with the mayor and recorder." Neither does the resolution adopted, by its terms, as has been argued, profess to make an independent committee of five members from the board of supervisors. Its language is: "Resolved, that a committee of," *i. e.*, consisting of. Its resolve is to appoint a committee, and the preposition "of" is evidently used in the sense just suggested, and not in that claimed for it. This application, then, must fail because no committee of the board of supervisors, appointed by the board, nor any committee consisting of supervisors only, appointed at a joint meeting, or anywhere, has required Mr. Pilsbury's attendance before it.

Second. Assuming, for the sake of argument, however, what is not true in fact, that the committee appointed "in joint meeting," or the supervisors alone who formed a majority of it, could be called a committee of the board of supervisors, there are other objections equally fatal. If the claim of the right to summon the witness be founded upon the clause in the section of the statute quoted (*sec. 44, vol. 1, R. S. [6th ed.], p. 879*), which provides for his examination "upon any subject or matter within the jurisdiction of such board," the answer is: "Section 4 of chapter 152 of the Laws of 1844 places the management and direction of the said penitentiary, when completed, * * * under the control and authority of the said board of supervisors and the said mayor and recorder of the city of Albany;" and, therefore, the "subject or matter" is not "within the jurisdiction of such board" of supervisors. If the position is that Mr. Pilsbury can be examined under the clause of section 44, giving the board of supervisors or its committee the right to examine "any officer of the county," the plain objection exists that he is no county officer. He is not so known, called or styled in any statute, nor is he appointed or controlled by county officials; and he is simply, to use the language of section 4 of chapter 152 of Laws of 1844 aforesaid, "one of the officers" appointed by the said board of supervisors and the said mayor and recorder, "to take charge" of the penitentiary, and is the "principal keeper"

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thereof. If it be argued that Mr. Pillsbury can at least, under said section 44 of the Revised Statutes, be compelled to produce "any book, account, voucher or document" which such committee may need as "relating to the affairs or interests of such county," because, though he is not one to be examined as a witness under the former parts of the statute already considered, he at least is a "person" who has such documents, the difficulty is that such "book, account, voucher or document" must relate "to the affairs or interests of such county." In some senses, perhaps, the documents sought might be considered as relating "to the affairs or interests" of the county of Albany. Its citizens, as such, are undoubtedly interested in the management of the penitentiary. Their money built it, and if it fails to pay expenses, their money must supply any deficiency. This line of argument, however, would extend the right of inquiry by boards of supervisors into matters and things over which the legislature of the state is alone supreme; a conclusion which no one would adopt as sound. Considering and construing the whole section together, it is reasonably clear, I think, that the expression is used in no such broad and universal sense. In the former part of the section, the right to examine the witness is granted only upon a "subject or matter within the jurisdiction of such board," or when the witness is "an officer of the county," and it cannot be assumed, that whilst the right to compel the giving of oral testimony is clearly limited either by the character of the subject-matter of the evidence, or by the personalty of the witness, the legislature intended to confer the power of compelling the production and giving of documentary evidence without any such limitation. Why should any such distinction have been made? Is it not a better and safer construction to say that the limits upon the oral testimony apply to the written, and that the "affairs or interests" spoken of are those over which the board of supervisors, as such, exercise control? Any broader interpretation of the law, when we consider the number of such boards in the state, would subject its citizens to examin-

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ations so frequent and numerous as to be intolerable. The subject (convict labor in prisons) upon which Mr. Pilsbury was to be examined, and over which the board of supervisors, as such, have no control, is very suggestive as to the number of individuals the board of supervisors of the county of Albany could annoy, if their powers are as broad as they are claimed to be.

Having reached the conclusion that the application for an attachment against Mr. Pilsbury cannot be granted for the reason that he has not been subpoenaed by or before any board of supervisors, or by or before any committee of such a board, and also because, even though the committee summoning him could be called a committee of the board of supervisors, a case is not made out under the statute, it is perhaps, unnecessary to go further. The application, however, suggests another difficulty worthy of some consideration, which is this, can the legislature confer upon the board of supervisors, or a committee thereof, such general and sweeping powers as the statute in words seeks to confer? If a county, whenever interested, can, through its officers, compel any "person," anywhere in the state, to appear before them, and require him to produce "any book, account, voucher or document in the possession of such * * * person, or under his control, relating to the affairs or interests of such county," then why may not any other municipal corporation (a town or a city for instance) be empowered to do the same thing? And if a municipal corporation may thus be made omnipotent, why not any other artificial body? And if the power is useful and should be intrusted to corporations (municipal or otherwise) why should not individuals enjoy and possess the same right and power? The courts, the regularly organized instrumentalities for the protection of public and private rights, possess ample power to guard and protect them, and it would seem to be a most dangerous abuse of private rights, if statutes such as those upon which this proceeding is founded can be upheld. In *Whitcomb's Case* (120 *Massachusetts*, 118, also

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reported in 21st *American Reports*, 502) it was held that a statute conferring upon the common council of a city the power to punish as a contempt a refusal of a witness summoned before it to answer questions, was unconstitutional and void. The principle of that decision seems to be applicable to the statute under consideration. The right to summon and examine witnesses, as well as the right to punish for contempt, is a supreme legislative and judicial power, and if the one cannot be delegated to a body upon whom no such power is conferred by the Constitution, can the other? Possibly, in our state, under section 17 of article 3 of our Constitution, which authorizes the conferring upon boards of supervisors "powers of local legislation and administration," the provisions of the statute under consideration may be upheld. It seems, however, to me very doubtful, but as the decision of this application does not depend upon the constitutionality of the law, and as the supreme court, at general term, in *The People agt. Learned* (6 *Hun*, 626), has decided that legislation conferring similar powers upon a commission created to investigate the canals was constitutional, no further discussion of this point will be attempted. Attention is only drawn to the subject as one worthy of grave consideration. The apparent conflict between the Massachusetts case and ours, the want, as it seems to me of any sound principle upon which such statutes can be upheld, and the grave evils and abuses which may flow from special and exceptional legislation of this character have induced me to make these suggestions, to the end that this very grave question may be hereafter more carefully considered.

The application for the attachment must be denied.

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COURT OF APPEALS.

ANTOINETTE BROWN agt. CHARLES T. GOODWIN *et al.*

Action to remove cloud upon title—Deed by United States internal revenue collector—recitals in, only prima facie evidence of facts by law authorized to be stated—Proof aliunde—Appeal.

In an equitable action to remove a cloud upon title to lands, the title being based upon a deed from a United States collector of internal revenue, such deed is *prima facie* evidence only of those facts which, by law, are authorized or required to be stated in it.

The recitals in a conveyance have no more force against third parties, not parties to it, than is given to them by positive law.

Where the recitals in the deed were simply those required by section 3198 of the United States Revised Statutes, to be set forth in the certificate of purchase, to be given to the purchaser by the officer making the seizure and sale, *i. e.*, the real estate purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor:

Held, that such deed is *prima facie* evidence of *no* other facts, save those which are needed by the laws of this state on a conveyance by a sheriff on a sale of real estate on execution.

Before a United States collector has any authority to sell lands for taxes, the United States must acquire a lien on the property in question. There is no lien until notice and demand of the tax, and neglect and refusal to pay; and no right to seize and sell real estate until there is failure to find personal estate. There can be no legal sale without these prerequisites exist previous to such sale, and the existence of them must be proved. They cannot be proven, *prima facie*, by the recitals of the deed, but may be by evidence *aliunde*.

On the dismissal of a complaint, after trial at special term, an affirmative finding of fact in favor of the defendant will not be sustained on appeal.

Decided December, 1878.

THIS action was brought to remove a cloud on the title of the plaintiff, consisting of two *lis pendens* filed by the defend-

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ants, in Onondaga county, New York, where the premises were sold by Mr. Smith, a United States internal revenue collector, and under his deed the plaintiff claimed title.

The premises were sold on a tax assessed against one Gertrude W. Sharkey, as a member of the firm of Alexander Ross & Co.; and the defendants claimed, under a judgment against one Marquis D. L. Sharkey, the husband, claimed to be a member of the same firm by the appellant. The judgment was entered on certain findings of Mr. justice DANIELS, on the equity side of the court, on the 16th day of December, 1872.

The equitable right of the defendants, in the interest of Marquis D. L. Sharkey, in the premises described in the complaint, were those of a judgment creditor of Marquis D. L. Sharkey, and were derived from advances made by him to his wife, Gertrude W. Sharkey, and invested in the firm of A. Ross & Co., delinquent tax-payers.

Her interest in the firm was derived from moneys of Marquis D. L. Sharkey, and he succeeded to it, and his creditors, also, by the decree. If at the time of the levy under the warrant her interest in the premises was seized, then, subsequently, when the *lis pendens* were filed, she had no interest in the premises for the defendants to seize or acquire, and the plaintiff's deed must be held good as against the defendants, if it is sufficient in law.

Judge VAN VORST held, at special term, that the recitals in the deed were not sufficient, and did not convey the right, title and interest of Mrs. Sharkey in the premises, so as to cut off her husband's interest in the same, from the defendants' lien on this judgment.

This the plaintiff claims is an erroneous view of the law, and appeals from the judgment dismissing the complaint.

T. C. Cronin, for appellant.

R. S. Ransom, for respondents.

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FOLGER, J.— This is a suit in equity, brought by the plaintiff to remove a cloud upon her title to lands. The alleged cloud consists of two *lis pendens* filed by the testator of the defendants, and a judgment recovered by the defendants. The *lis pendens* assert a right in the lands hostile or paramount to the right of the plaintiff alleged by her and the judgment determines that the defendants as executors have the right asserted in the *lis pendens*. Doubtless they are a cloud upon her title, if she has the title which she claims.

This appeal can be determined, however, by a consideration of the single question, whether the plaintiff upon the trial of this action made out a title in herself to the lands.

The plaintiff's title hangs upon a deed from the United States collector of internal revenue, in and for the twenty-third collection district of the state of New York, and to be more definite than that, it hangs upon this, whether the recitals in that deed are sufficient, *prima facie*, to make out a right in him to sell and convey.

The recitals in a conveyance have no more force against third parties, not parties to it, than is given to them, by positive law. We must look for positive law in this case in the statutes of the United States for the collection of internal revenues; section 3198 of the United States Revised Statutes, which is treated by the counsel for the parties as a correct statement of the statute law affecting the transaction, provides that upon the sale of real estate, and the payment of the purchase-money, the officer making the seizure, and sale, shall give to the purchaser a certificate of purchase which shall set forth the real estate purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor. This is all that, by the law, is required to be set forth in that certificate. The same section further provides that, if the real estate be not redeemed according to law, the officer shall execute to the purchaser, in his surrender of that certificate, a deed of the real estate, reciting the facts set forth in the certificate, and in accordance with the laws of the state in which the real

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estate is situated, upon the subject of the sales of real estate under execution. Section 3199 provides that the deed thus given shall be *prima facie* evidence of the facts therein stated; and that, if the proceedings of the officer as set forth have been substantially in accordance with law, the deed shall operate as a conveyance of all the right of the party delinquent in the real estate at the time the lien of the United States attached thereto. This provision, that the deed shall be *prima facie* evidence of the facts stated in it, makes such evidence only those facts which, by law, are authorized or required to be stated in it (*Marsh agt. City of Brooklyn*, 59 N. Y., 280). Hence the deed in this case is *prima facie* evidence: First. That the particular real estate described in it was purchased at the official sale. Second. That it was sold for the taxes, among others, of Gertrude W. Sharkey. Third. That Henry J. Hubbard, the grantor of the plaintiff, was the purchaser. Fourth. That he paid therefor the price of \$5,500. It is *prima facie* evidence of no other facts, save those which are needed by the laws of this state on a conveyance by a sheriff on a sale of real estate on execution. Those are, that the premises have not been redeemed according to law, and, perhaps, other matters which do not affect the question before us here (2 R. S., p. 373, sec. 62). It is seen, at once, that the matters which are made *prima facie* evidence do not show how the United States got a right to sell these lands. It is provided, by statute, that the collectors of internal revenue shall inquire after persons liable to pay a tax (*U. S. R. S.*, sec. 3172); returns are to be made or compelled (*id.*, secs. 3173-81); the commissioner of internal revenue is to make assessments and certify them to the proper collector (*id.*, sec. 3182); the collector shall give ten days' notice to pay the tax, stating the amount and demanding payment (*id.*, sec. 3184). It is not until there has been neglect or refusal to pay the tax, after that notice and demand, that the amount of it becomes a lien in favor of the United States (*id.*, sec. 3186); not until then can the collector distrain and

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sell (*id.*, secs. 3187, 3188); nor can real estate be seized and sold for a tax until there is a failure to find goods, chattels or effects sufficient to satisfy the tax (*id.*, sec. 3196); there must also be given to the party a notice of the property to be sold, and the time and place of sale (*id.*, sec. 3197).

Thus, it is seen, that there is no lien until notice and demand of the tax, and neglect or refusal to pay; and no right to seize and sell real estate until there is a failure to find personal estate. These things are prerequisites to the right to seize and sell lands, or an interest in them; there can be no legal sale without they exist theretofore; but the authorized recitals in the deeds in hand did not show these things, nor was there any proof of them *alivunde*. How, then, did the plaintiff make out an authority in the United States collector to sell these lands to her grantor? She did not make it out. The cases cited in the opinion delivered at special term are sufficient to sustain this view (*Williams agt. Peyton*, 4 *Wheaton*, 77; *Matan agt. Davis*, 4 *McLean*, 211; *Jackson agt. Shepherd*, 7 *Cow.*, 88).

Coleman agt. Shattuck (62 *N. Y.*, 348), relied upon by appellant, is not in conflict with these views. By the law under which that case was decided, the comptroller's deed was made "presumptive evidence that the sale, and all proceedings prior thereto, including the assessment of the land," &c., were regular and in accordance with law — quite a different and more extensive provision than that here.

It is true that section 3199, above cited, provides that the deed shall be considered and operate as a conveyance of all the right, title and interest which the party delinquent had in and to the real estate at the time the lien of the United States attached thereto; it only so operates, however, if the proceedings of the officer, as set forth in the deed, have been substantially in accordance with law. The word "if" implies that all the prerequisites must exist to make his proceedings as set forth, that is, those authorized to be set forth according to law. Before a tribunal can know that they did exist,

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the existence of them must be proved to it. The assessment of the tax, the notice and demand of it, the failure to find personal estate to satisfy it, and the notice of seizure of real estate, are needful prerequisites to be shown to make the sale and certificate of sale, and giving of the deed, in accordance with law. They may not, as we have seen, be proven *prima facie* by the recitals of the deed, and there was no other evidence of them (*See Hilton agt. Bender*, 69 *N. Y.*, 75).

We do not think it needful to examine any other grounds claimed by the respondents why the plaintiff cannot maintain her action. It is enough, for this appeal, that we hold that the recitals in the deed do not make the proof she need to adduce, nor is it needful to consider the points made by the appellant as to the inequitable character of the defendants' relation to these premises.

Until the plaintiff shows a right to the lands, she shows no right to question any other person's claim to it; nor does the claim that the *lis pendens* filed by the defendants failed to set forth the defect now found in the appellant's proof avail her. It does not appear that she has been misled by relying upon its statements, or its lack of fullness of statement; and if this were not so we should hesitate to say that a party is required, in a notice of *lis pendens*, to anticipate and state all the defects which may appear in the proof of another claimant of the land on the trial of any action which the latter may bring. Kindred to this is the claim that the defendants are estopped from objecting now to the failure in her proof, because, at the collector's sale, they did not give notice that he could give no title by his sale, for that no government lien had attached for want of a notice and demand of the tax and the like. The elements of an estoppel are not here. It does not appear that the defendants had that knowledge then, or that the plaintiff's grantor, Hubbard, bought and paid for the land, relying upon the absence of those particulars from the notice of the defendants, or that he was induced thereby to make his bid and fulfill it.

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As the case comes to us it is one of a failure of proof to establish an important part of the plaintiff's case. The defendants at the trial took advantage of that failure. It does not appear that there did not exist just what it is needful for the plaintiff to show did exist, nor but that it may be possible for proof to be made thereof at another time. How, then, can we hold that the defendants were derelict in not, at some time prior to the trial, giving notice that such defects existed? Nor was any such position taken by the appellant at the trial.

We see no principle on which we can hold with this appellant upon this ground.

The judgment appealed from should be affirmed.

All concur; ANDREWS, J., taking no part.

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SUPREME COURT.

EDWARD RAWL *et al.* agt. CHARLES L. GUILLEAUME.

Discharge from imprisonment on execution against the person.

A voluntary discharge from arrest by the plaintiff of a defendant, held in custody under an execution, satisfies the judgment.

Such a release constitutes, in law, a satisfaction.

Where, however, a defendant was not arrested before judgment, and on being taken into custody, after judgment, disputes the right thus to imprison him and notices a motion to be discharged to set aside the arrest, and the plaintiff, without waiting for the action of the court, consents to the defendant's discharge, such consent is not voluntary and will not operate as a satisfaction.

In such a case it is, as to him, a determination in his favor that the execution had been irregularly issued. In such a case he cannot afterwards claim that the execution was legally issued, and because of his discharge claim the right to have the judgment against him satisfied.

The case is substantially the same as though the discharge had been secured without the plaintiff's assent, for it was induced by the hostile action of the defendants.

First Department, General Term, May, 1878.

THE defendant was arrested upon an execution issued against his body. Thereupon he noticed a motion to set aside the execution for the reason that the plaintiff had not obtained an order of arrest in the action prior to the judgment, and that this was not one of the cases in which a *ca sa* could issue without such preliminary order.

The plaintiffs, after service upon their attorney of the motion papers, consented to the discharge from custody of the

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defendant, he stipulating not to sue plaintiffs on account of the arrest.

Thereupon the defendant moved to have the judgment marked satisfied of record, claiming that his discharge from custody by plaintiffs, was voluntary.

The court denied the motion.

The defendant appealed to the general term.

Geo. Van Slyck, for defendant and appellant.

A. Blumenstiel, for plaintiffs and respondents. *A. R. Dyett*, of counsel.

DANIELS, J.—The motion was made to satisfy the judgment, because an execution had been issued against the person of the defendant, under which he was arrested and held in custody, from the second to the fourth of February, when he was discharged by direction of plaintiffs' attorneys. There can be no doubt but that this would have satisfied the judgment and entitled the defendant to the order, if it had been all that there was of the case, for an arrest on execution and a release of the defendant from custody, under the authority of the plaintiff, constitutes, in law, a satisfaction. But this was not a case of that description, for the defendant did not acquiesce in his liability to arrest upon the execution, as he had not been arrested by order before the recovery of the judgment. For that reason a motion was noticed in his behalf to set aside the arrest and release him from custody, and thereupon, without awaiting the action of the court on the motion, the plaintiffs' attorney practically assented to its propriety, and for that reason consented to the defendant's discharge, on the terms the court would probably have exacted on a favorable decision of the motion, which were, that no action should be commenced for false imprisonment. The effect of the arrangement was to afford the defendant the same result that he insisted he was entitled to secure by the hearing and decision

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of the motion, and it should obviously have no other or greater effect. The defendant was allowed to succeed upon his motion, without formally making it. As to him it was a determination in favor of the accuracy of the position taken by him that the execution had been irregularly issued because he was not liable to arrest upon it. Whether that is strictly the case or not it is not necessary to decide. The defendant asserted it to be so and the plaintiffs assented to the correctness of his position; and now, after he has gained his point and secured all the advantage it can possibly afford him, he should not be permitted to avail himself of the entirely inconsistent claim that the execution was legally issued against him, and for that reason the judgment was satisfied by his custody under it. That would be entirely unfair and unjust, and no authority has been found requiring the position to be sustained. The discharge may have been erroneously produced, but after the defendant has secured the full benefit of the error he ought not to be allowed to affirm its existence to the prejudice of the other party. The execution must now be considered as irregularly issued, and for that reason the plaintiffs did not have the advantage from it, in the way of securing satisfaction of their judgment, which they would have had if they had been entitled to it as a proper process for the satisfaction of their judgment. And having been deprived of its benefit by the proceedings of the defendant himself, to which they were induced to accord their assent, he should not now defeat their judgment by affirming that they have voluntarily abandoned the process through whose instrumentality actual satisfaction of their demand might otherwise have been secured. Upon sound legal principles the motion was properly denied. The case is substantially the same as though the discharge had been secured without the plaintiffs' assent, for it was induced by the hostile action of the defendants; and if they had permitted the motion to proceed to a hearing and the execution had been set aside, it would not have prejudiced their right to resort to the usual process against property for

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the recovery of their debt (*Gonochio* agt. *Figaeri*, 4 *E. D. Smith*, 227; *Wesson* agt. *Chamberlain*, 3 *Com.*, 331). And the same result should be attended with no other effect when brought about by acquiescence in the propriety of the claim that was made that the execution was not authorized by the judgment that was recovered.

The order should be affirmed, with the usual costs and disbursements.

Butler *et al.* agt. Flanders.

N. Y. SUPERIOR COURT.

FREDERICK BUTLER *et al.* agt. ABRAHAM H. FLANDERS.

*Commission to take testimony — When deposition will or will not be suppressed —
Code of Civil Procedure, § 910.*

The bare fact of the receipt (by a witness to be examined under a commission) of both sets of interrogatories, prior to his examination, is not a sufficient ground for the entire suppression of the deposition, where no prejudice is shown to have accrued to the defendant therefrom.

Where it appeared, upon the face of the commission, that the witness examined under it on behalf of the plaintiffs was, prior to his examination, supplied by the counsel for the plaintiffs with copies of the interrogatories and cross-interrogatories to be administered to him; no prejudice being shown to have accrued to the defendant:

Held, that the deposition, as it was and as far as it went, might stand for what it was worth, but upon certain conditions, only.

Held, further, that the fact of the receipt, by the witness, of the interrogatories in advance of his examination, would simply affect the credibility and weight of his testimony, and that this being so the defendant must have leave and an opportunity to frame and administer such further cross-interrogatories as he may be advised, and, in case he elects to avail himself of this privilege, the commission must be returned for further and final execution at the sole expense of the plaintiffs.

Special Term, November, 1878.

MOTION by defendant to suppress deposition.

James K. Hill, for motion.

J. H. Dougherty, in opposition.

FREEDMAN, *J.* — It appears upon the face of the commission that the witness examined under it on behalf of the plaintiffs

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was, prior to his examination, supplied by the counsel for the plaintiffs with copies of the interrogatories and cross-interrogatories to be administered to him. Whether they were sent to him directly or indirectly can make no difference as long as they were actually furnished to him in advance of his examination. That they were so furnished is admitted by plaintiffs' counsel in the affidavit submitted by him.

No prejudice is shown to have accrued to the defendant therefrom, except such as may be inferred from the bare fact of the receipt by the witness of both sets of interrogatories, and the question is, therefore, whether such fact alone calls for the suppression of the deposition.

When a witness has been examined in chief, the other party has a right to cross-examine him for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motives, his inclination, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, his powers of discernment, memory and description. Such cross-examination is one of the principal and most efficacious tests which the law has devised for the discovery of truth, and the right to its free and full exercise is deemed of such great importance that if a witness dies after he has been examined in chief, and before his cross-examination, his testimony is inadmissible (*Kissam agt. Forrest*, 25 *Wend.*, 651).

But such test is rendered almost, if not quite, useless if the witness can be posted by the party calling him in advance as to the entire range which the cross-examination is to take, and made thoroughly acquainted with the form, nature and purpose of every question intended to be put to him on the cross examination.

To sanction such a practice would in many cases lead to the grossest abuse. The tribunal which is to pass upon the testimony of the witness is entitled to his independent recollection of the facts to which he may be able to testify, as such recol-

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lection may appear from the whole range of his examination ; and this implies that the whole examination throughout must be fairly conducted. Each party is entitled, therefore, to freely and fully examine him without undue interference on the part of the other.

The statute authorizing the issuing of commissions to take the testimony of witnesses residing abroad, is an innovation on the common law rules of evidence (*Jackson agt. Hobby*, 20 *Johns.*, 361), and hence the principle that its positive requirements must be strictly complied with, has always been recognized and acted upon. But even beyond that, whenever undue means are employed to give shape or color to evidence taken upon commission, says ALLEN, J., in *Commercial Bank of Penn. agt. Union Bank of New York* (11 *N. Y.*, 203), it will be proper, upon motion, to set aside the deposition and order the commission to be executed anew, or deprive the party thus abusing the process of the court of its benefit, as shall be deemed most fit.

So where the taking of the deposition was suspended in consequence of the sickness of the witness, and subsequently the witness appeared again with his counsel, and the examination was commenced anew, and the witness read his answers to all the interrogatories, direct and cross, from a paper he brought which had been prepared by himself and counsel and was in his counsel's handwriting, the deposition was, on motion, suppressed (*Creamer agt. Jackson*, 4 *Abb.*, 413).

Section 910 of the Code of Civil Procedure enumerates the cases in which the deposition may be suppressed, and any unfair or overreaching conduct on the part of the attorney for either party, to the prejudice of the adverse party, in the course of the proceedings, as well as fraud, is made a sufficient ground for the suppression of the deposition.

Upon the whole case, however, as it appears before me, I may well hesitate to suppress the deposition altogether. No special prejudice is shown to have been sustained by the defendant, nor is it apparent from the deposition that he sus-

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tained any. I am also satisfied that in transmitting copies of the interrogatories, plaintiffs' counsel had no intention to thereby secure an unfair advantage over the defendant. The deposition, as it is and as far as it goes, may therefore stand for what it is worth, but upon certain conditions only. Under this disposition of the motion, the fact of the receipt, by the witness, of the interrogatories in advance of his examination, will simply affect the credibility and weight of his testimony. This being so, the defendant must have leave and an opportunity to frame and administer such further cross-interrogatories as he may be advised. In case he elects to avail himself of this privilege, the commission must be returned for further and final execution at the sole expense of the plaintiffs.

Let an order be entered accordingly.

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SUPREME COURT.

MARTHA D. SMITH agt. GAMALIEL S. SMITH and others.

Cause of action — Malicious abuse of process — Lis pendens — Complaint — Demurrer.

An action on the case may be maintained to recover damages for wrongfully, maliciously and without reasonable or probable cause, filing a notice of *lis pendens*, whereby the plaintiff was prevented from selling her property. *

Special Term, February, 1878.

THIS is an action on the case to recover damages by reason of the defendants having wrongfully, maliciously and without reasonable or probable cause, filed in the clerk's office of the county of New York, a notice of pendency of action affecting the property of the plaintiff, described in the complaint, charging that said plaintiff was not the owner of the property, and that her title thereto was fraudulent against defendants, who claimed to be creditors of her husband. This notice of pendency of action was canceled by the defendants' own act prior to the commencement of this action.

The complaint alleges that, at the times hereinafter mentioned she was the owner, in fee simple, of house and lot (describing them) * * * . That said defendants, on the tenth day of July, 1873, through their attorney, duly authorized by them as this plaintiff is informed and believes, filed,

* See, to the same effect, the decision of the court of appeals of Kentucky, in *Wood agt. Furnell* (17 *American Law Register* [New Series], p., 689).

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or caused to be filed, in the county clerk's office, a notice of pendency of action, upon and referring to the complaint in a certain action then pending in the court of common pleas, wherein the said defendants were parties plaintiff and this plaintiff and others were made parties defendant, wherein and whereby it was, among other things, alleged in said notice that said action had been commenced, and was pending, to recover the interest of this defendant's husband in the premises, and which was the property of this plaintiff, and the complaint in which action, alleged and declared the said premises to be the property of said husband, and that her title to the same was fraudulent as against the said defendants, who claimed to be creditors of her said husband. That the statements and allegations contained in said notice so filed and in the complaint to which the same referred, charging this plaintiff with not being the owner of said lot of land and the building thereon, and that her ownership of the same was fraudulent and void as against the creditors of her husband, were, and are, wholly false and were made maliciously and with the intent to injure the said lot of land, and building, as well as this plaintiff, and to prevent her from selling the same. That, thereafter, and on the 27th day of June, 1874, the said notice of pendency of action was, by order of the court, canceled of record on application of defendants' attorney, whereby the same was wholly ended. That on or about August, 1878, and after the filing, as aforesaid, of the said notice, and before the same was canceled, this plaintiff had a *bona fide* offer and could have sold the said lot of land and the building thereon, together with the furniture therein contained, for the sum of \$130,000, to one A. B. Rand, but that in consequence of said notice and the filing thereof, and the matters so set forth in said complaint, the said A. B. Rand refused to purchase the said lot and building and this plaintiff was prevented from effecting a sale thereof. That by reason of the premises and of the wrongful and malicious act of the said defendants in so filing said notice, this plaintiff lost the sale of the said lot and

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building, and in consequence thereof, suffered damage in the sum of \$50,000.

A demurrer is interposed by the defendant, Gamaliel S. Smith, on the ground that the complaint does not state facts sufficient to constitute a cause of action as to this defendant.

Foster & Thompson, for defendants.

Geo. W. Carpenter, for plaintiff. *Benjamin F. Carpenter*, of counsel, argued that it cannot be called strictly an action for malicious prosecution, or for slander of title, but rather an action on the case for abuse of process, having some of the elements of both of the former kinds of action.

It states but one cause of action, viz., to recover damages for the malicious act of the defendant in wrongfully using a notice of pendency of action, whereby the plaintiff was prevented from selling her property (*See Bebinger agt. Sweet*, 1 *Abb. N. C.*, 263). The notice of pendency of action affected the title of the plaintiff and gave notice to the world that she was a fraudulent owner, and was guilty of a misdemeanor under our statutes (*R. S. [6th ed.]*, p. 969, sec. 3). This is analogous to an action for wrongfully suing out an attachment against property in a civil action. The party may proceed with his action, without attachment or *lis pendens*; but if he wrongfully issues either, whereby a defendant has sustained damage, he is liable. An action on the case lies wherever injury is effected by regular process of a court of competent jurisdiction (*Chitty's Pleadings*, vol. 1, p. 133 and cases cited in note; *Swan agt. Saddlemire*, 8 *Wend.*, 676; *Brown agt. Feeter*, 7 *id.*, 301). An action lies for maliciously suing out an attachment, and it is not necessary to allege the determination of the action (*Bump agt. Betts*, 19 *Wend.*, 421). It is so in regard to *lis pendens*. When an attachment is set aside, or *lis pendens* is vacated, the party injured is not compelled to wait the determination of the action, but his cause

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of action arises at once. It was the *lis pendens* that caused the plaintiff's damage, not the action in which it was used. When the *lis pendens* was canceled and annulled plaintiff's cause of action was perfect. A wrongful act has been done by the defendants, and, by reason of it, the plaintiff has sustained damage. There is no rule of law which prevents her recovery upon the admitted facts of the complaint.

LAWRENCE, J. — The demurrer to the complaint should, in my opinion, be overruled. As I view it, this is an action brought for the recovery of damages, resulting from the wrongful and malicious act of the defendants, in wrongfully using the process of the court, and thereby preventing the plaintiff from selling her property. In *Closson agt. Staples* (42 Vermont, p. 217), WILSON, J., delivering the opinion of the court, says: "The earlier English cases show very clearly, that before the statutes entitling defendants to costs, they had an action at common law for injuries sustained by reason of suits, *which were malicious and without probable cause*. It would seem, however, from more recent decisions, that the present English rule, which restricts or limits the right of action for maliciously prosecuting civil suits, without probable cause, stands mainly upon the ground that the costs which the statutes provide that the successful defendant shall recover, are an adequate compensation for the damages he sustains, but under their rule it does not appear that the right of action is restricted to those cases, when the process is by attachment."

After stating the mode of commencing suits, under the statutes of Vermont, the learned judge proceeds to say: "The principle of the common law, recognized by the English courts, before the statutes allowing costs to the defendants, and which gave a remedy for injuries sustained by reason of suits which were malicious and without probable cause, *is and ought to be operative still*, and we think it affords a remedy in all such cases where the taxation of costs, is not an adequate compensation for the damages sustained" (P. 219).

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And again, "but where the damages sustained by the defendant, in defending a suit maliciously prosecuted without reasonable and probable cause, exceed the costs obtained by him, *he has, and of right should have, a remedy by action on the case*" (P. 221).

The opinion of the supreme court of Vermont, from which I have so freely quoted, ably discusses the points principally relied upon in the elaborate brief of the learned counsel for the defendants in this action, and the conclusions reached by the court seem to me to be in accordance with justice and legal principles (*See, also, Whipple agt. Fuller*, 11 Conn., 581; *Bebinger agt. Sweet*, 1 Abb. N. C., p. 263).

This case, as is contended by the plaintiff's counsel is analogous to the case of wrongfully suing out an attachment, against property in a civil action, and in such a case, an action lies (*Bump agt. Betts*, 19 Wend., 421).

The defendants, by demurring to the complaint, have admitted that the alleged wrongful acts of the defendants were done maliciously, and without probable cause, as well as the allegation that the *lis pendens*, and the proceedings in regard thereto were ended.

I do not regard the other objections to the complaint as well taken. The demurrer is therefore overruled, with leave to the defendants to answer over within twenty days on payment of costs.

Wilbur agt. White.

SUPREME COURT.

HORACE M. WILBUR, assignee in bankruptcy, agt. GUEVIRA
M. WHITE.

Costs — Assignee in bankruptcy — Code of Procedure, § 317

An assignee in bankruptcy will not be compelled to file security for costs on the ground that there are not funds belonging to the bankrupt's estate, represented by him, sufficient to pay said costs if defendant should succeed in the action.

Nor is he, under section 317 of the old Code, personally liable for costs, except where guilty of misconduct or bad faith (*See, to same effect, memorandum by VAN HOESSEN, J., N. Y. common pleas, in Hall, assignee, agt. Waterbury, January, 1879*).

Jefferson Special Term, September, 1878.

MOTION by defendant for costs pursuant to the statute, and amongst others, under section 317 of the Code of Procedure, on the ground plaintiff, as assignee, has not funds. "There are not funds, belonging to the bankrupt's estate, represented by him, sufficient to pay said costs, if defendant succeeded in the action." The action has but recently been brought and no answer has been put in. The defendant says he has a defense.

Levi H. Brown, for motion.

Dorwin & Remington, opposed.

HARDIN, J.—If a case was made of bad faith or mismanagement, in the prosecution of the action, the court, in its

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discretion, might impose costs personally. Such imposition might be made after trial of the action.

The court, in its discretion, may require security for costs (*Old Code*, sec., 317; *Gedney* agt. *Purdy*, 47 *N. Y.*, 676; *Norris* agt. *Breed*, 12 *Abb. [N. S.]*, 185). But when the action is brought and prosecuted in good faith such security will not be required (*Olcott* agt. *Maclean*, 18 *Sup. Ct. R. [11 Hun]*, 394).

RAPALLO, J., says, in *Read* agt. *Waterhouse* (52 *N. Y.*, 589): "The fact that the trust fund is under the jurisdiction of another tribunal, does not seem to me sufficient to overcome the express provisions of section 317."

This motion has been put upon the ground that the plaintiff has no funds in his hands and the defendant does not cite a case where the mere absence of funds led the court to exercise its discretion under section 317 of the Code (*Darby* agt. *Condit*, 1 *Duer*, 599).

The case of *Webb* (18 *Sup. C. R. [11 Hun]*, 124), is not in point. The right of a foreign administrator or executor to sue in our courts was the point there involved. *Cummings* agt. *Edgerton* (9 *Bos.*, 685) was one where the action was to vex, and declared an unnecessary action by *ROBERTSON .J. Ketcham and Blake* agt. *Clark* was a case where an assignee brought an appeal in name of his assignor and he was held to give security for costs (4 *John.*, 484).

If the defendant shall be able, in the future progress of the action, to show mismanagement or bad faith he may make a motion predicated thereon.

This motion is denied with ten dollars costs.

Clarkson agt. Millnacht.

N. Y. COMMON PLEAS.

WILLIAM R. CLARKSON, CHARLES J. WARREN and AMOS B.
STRATTON agt. GEORGE M. MILLNACHT.

District courts—non-residents having a place of business in the city, to be deemed, for purposes of suing, residents of district in which their place of business is situated.

Under the provisions of the act of 1862 (*Laws of 1862, chap. 484*), in regard to the district courts of the city of New York, providing that no person, having a place of business in that city, shall be deemed a non-resident of it, non-residents having a place of business in the city, for purposes of suing in the district courts, are to be deemed residents of the district in which their place of business is situated.

Plaintiffs were partners, having a place of business in the first district, two of them being non-residents and the other a resident of the seventh district, the defendant being a resident of the ninth district.

Held, that the suit was properly brought by long summons in the first district, under section 4 of the district court act of 1857 (*Laws 1857, chap. 144*), providing that the action may be brought in the district in which one of the plaintiffs resides.

General Term, March, 1876.

APPEAL from judgment of first district court against defendant for forty-five dollars and thirty-six cents and costs for goods sold and delivered. Action commenced by long summons. The plaintiffs are copartners and had a place of business at No. 27 Pearl street, in the city of New York (first judicial district). Two of the plaintiffs, Clarkson and Warren, reside out of the city and the other, Stratton, resides in Fifty-third street (seventh judicial district).

This action was commenced in the district court, for the

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first judicial district, upon the theory that the two plaintiffs, Clarkson and Warren, living out of the city, but having a place of business in the first judicial district, were within the district court act of 1857 as amended in 1862 (*Laws of 1857, chap. 344, section 4; Laws of 1862, chap. 484, amending section 4 of last named act*).

Christian G. Moritz, for appellant.

Coffin & Kimball, for respondents.

J. F. DALY, J.—Section 4, of the district court act of 1857, provides that the action may be brought in the district in which one of the plaintiffs resides. The same section, as amended by the act of 1862, declares that no person, who shall have a place of business in said city, shall be deemed a non-resident under the provisions of that act.

Section 4 is entitled "In what district action to be brought," and all the provisions of the section must be read as referring to the subject of bringing the suit in the proper district as well as to other provisions of the act. The plain intent of the amendment of 1862 was to place non-residents, doing business within the city, on the same footing as residents in all matters relating to the jurisdiction of courts over actions by or against them. If they are to be deemed residents of the city it is with reference to their *locale* therein to determine the jurisdiction of the court, since it is in the section relating to particular jurisdictions, that they are classed as residents of the city; but the only circumstance to fix the particular jurisdiction is the place of business, and that must be deemed the locality or place of residence since they are declared to be residents.

If these views be correct, the action was properly brought by the plaintiffs' firm, in the first district, where their place of business was situated, although two of the firm were not residents of the city in fact, and one of them was an actual

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resident of another district, and the judgment should be affirmed with costs.

DALY, Ch. J., and VAN HOESEN, J., concur.

NOTE.—Our attention has been called to the foregoing decision by a prominent member of the bar, who stated to us that in two or three instances, within a few days past, lawyers have been defeated in their actions, not knowing of this decision, although the opinion was rendered some two years since. For this reason we deem it of sufficient importance to give it place even at this late date. We understand a motion for leave to go to the court of appeals, in this case, was subsequently made at a general term, held by CHAS. P. DALY, Ch. J., ROBINSON and VAN BRUNT, JJ., and the motion denied with costs; VAN BRUNT, J., delivering the opinion and all the judges concurring. [REp.]

Devlin agt. Murphy.

SUPREME COURT.

WILLIAM DEVLIN agt. THOMAS MURPHY, WILLIAM FULLETON
and others.

Mortgage — Covenant in a deed to pay same — when it may be released.

Where M. conveyed to F. certain lands, subject to a mortgage, which, by the covenants in the deed, F. agreed to assume and pay, but an agreement was made, *contemporaneous with the deed*, that M. would take back the land, at any time, should F. become dissatisfied with the purchase, and release F. from the covenants, and F. afterwards reconveyed the land to M., who released him from the covenants in the original deed: *Held*, that the release of M. to F. discharged him from all claim to pay the mortgage, and that the holder thereof was not entitled to a judgment against F., for any deficiency arising on a sale, in an action of foreclosure (*See Flagg agt. Munger*, 5 *Seld.*, 483; *Crowell agt. St. Bernards*, 27 *N. J. E.*, 650; *but. see Whiting agt. Gearty*, 14 *Hun*, 498, *note at end of case.*)

Special Term, February, 1878.

John E. Develin, for plaintiff.

E. L. Fancher, for defendant Fullerton.

VAN VORST, J. — The defendant, Fullerton, has testified that it was a part of the terms and conditions upon which he became a purchaser of the lands covered by the mortgage sought to be foreclosed in this action, that his grantor, Murphy, would, at "*any time thereafter*," accept of a reconveyance of the lots and reimburse him for what he had paid out, and "reinstate him as he was at first." In the event of a reconveyance he was to get back, principal and interest, all he

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should pay as consideration, and all disbursements, including taxes and assessments, and he was to be released from all obligations he should assume. This, according to Mr. Fullerton's testimony, was the "final agreement," when the conveyance was made and accepted. The defendant, Murphy, corroborates this statement, at least to the extent that he would take back the property whenever Fullerton "got tired of it." The deed to Fullerton contains a covenant by which he assumed the payment of a mortgage then existing upon the premises, executed by Murphy to Henry F. Spaulding and others, for \$2,940, being the mortgage in suit. The conveyance to Fullerton was in the year 1872. By deed dated April 5, 1877, Fullerton reconveyed the premises to Murphy. This conveyance, which is also signed by Murphy, contains, amongst other things, a release of Fullerton from any obligation he had incurred, with respect to the mortgage, through the covenants in the deed, and Murphy himself assumed and agreed to pay it. The agreement between Murphy and Fullerton, in effect, contemporaneous with the deed, was verbal. But it was performed in part at the time, by the making and acceptance of the original conveyance, and the reconveyance was made and received in further performance of it. It is objected by the plaintiff, that this *verbal* agreement was invalid. But I apprehend that the question of the invalidity of the agreement, and whether or not it should be carried out, rested with Fullerton and Murphy exclusively. Whether or not, the agreement was void for indefiniteness as to time, or because not reduced to writing, was for the determination of Murphy. He only could object that a delay of five years in making the reconveyance was unreasonable. If Murphy felt himself bound in conscience to carry out the agreement, and accept a reconveyance, after a lapse of five years, and further to do what he could towards *reinstating* Fullerton, it is not for others, who are neither parties nor privies to the agreement, to complain. There is certainly nothing inequitable in the result reached through the reconveyance if the intentions and agreements of the par-

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ties made in good faith, are fully carried out. A stranger to the contract cannot object that the agreement was not in writing (*Dempsey agt. Kipp*, 61 *N. Y.*, 471), nor that Murphy was not bound to accept a reconveyance. He believed that he was bound, and acted upon such belief; that is sufficient. It is true that Fullerton's covenant, with respect to the payment of the mortgage, was to the advantage of the holder of the mortgages and could have been enforced by him so long as the covenant was in force. But that, in itself, affords no valid reason why the parties who made the covenant should not carry out an agreement, honestly made, contemporaneous with the covenant, although the effect be to discharge the covenant and deprive a third person of an advantage he might secure with the covenant in force. If the holder of the mortgage obtained any right, it is in subordination and must yield to the earlier rights and equities of Fullerton, through the original agreement, in which the covenant in question originated. *Stephens agt. Casbacker* (8 *Hun* 116) is an authority that Murphy's subsequent release operates as a discharge of Fullerton from all obligations assumed under the deed to him. And the case under consideration is stronger in its facts for the defendant than *Stephens agt. Casbacker*. In that case the subsequent conveyance of the land and the release were not the result of an agreement made contemporaneous with the covenant. The fact that plaintiff's action for the foreclosure of the mortgage was pending when the reconveyance was made, and the release given, does not affect the question.

The commencement of the plaintiff's action could not prevent the parties from carrying out a prior agreement between themselves.

The action may proceed to judgment of foreclosure, but the defendant, Fullerton, is not liable for any deficiency.

As between plaintiff and the defendant, Fullerton, neither should recover costs, as from the condition of the record, the plaintiff was justified in bringing in Fullerton as a party.

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NOTE.—*Stephens* agt. *Casbacker* (8 *Hun*, 116), referred to in the foregoing opinion, is cited in *Whiting* agt. *Gearly* (14 *Hun*, 498) which holds that the grantor cannot release the grantee from a covenant to pay a mortgage, after knowledge of the covenant is brought to the creditor, and he has commenced proceedings to enforce it. But in this case, it will be observed, the agreement to release was not contemporaneous with the creation of the covenant which is the principal feature in the case above reported. [REP.]

Douglass agt. Cross.

NEW YORK SUPREME COURT.

ELIZABETH M. DOUGLASS as executrix, &c., agt. NELSON CROSS
and others.

Mortgage — what language in a deed imports an assumption thereof.

Where the consideration expressed in a deed of conveyance of land was the sum of \$15,000, but the deed contained a clause in these words: "subject, however, to the assumption as a part of the consideration," of the conveyance, of a mortgage upon the land:

Held, that the language of the deed amounted to an agreement on the part of the grantee to pay the mortgage.

Collins agt. Rowe (1 Abb. N. C., 97), distinguished.

Special Term, October, 1878.

ACTION of foreclosure with claim for deficiency.

Scott & Crowell, for plaintiff.

N. A. Hulbert, for defendant, Byrne.

VAN VORST, J.—The defendant, Byrne, claims that he is not liable for any deficiency, which may arise, upon the sale of the mortgaged premises.

The premises were conveyed to him by Nelson Cross, the mortgagor and owner, by warranty deed dated the 27th day of March, 1877.

The consideration, expressed in the deed, is the sum of \$15,000.

The premises were conveyed "subject, however, to the

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assumption, as a part of the consideration" of the conveyance, of the mortgage under consideration.

The question arises, does this language amount to an agreement on the part of the grantee to pay this mortgage?

In *Collins agt. Rowe* (1 Abb. New Cases 97), this subject was considered.

To create a positive engagement, on the part of the grantee, to pay a mortgage on the premises, existing at the time of the conveyance, precise and formal words are not necessary.

The inquiry should be, what was the intention of the party, fairly to be gathered from the words used?

In *Collins agt. Rowe*, the words considered were "subject, nevertheless, to the payment of one-eighth of a certain mortgage now on the premises." It was held that such language did not place the grantee under an engagement to pay the mortgage. The land was conveyed subject to the payment of the mortgage in question. The land and not the grantee, was so subject. But in the case under consideration the words used are quite different, and evidently import an obligation on the part of the grantee personally.

The words clearly import that the grantee, as part of the consideration of the conveyance to him, takes upon himself the burden of this mortgage; he assumes it, that means he will pay it.

In the case of *Trotter agt. Hughes* (12 N. Y., 75), to which I am referred, the grantor was not personally holden for the mortgage, as he is in the case under consideration. That I regard as an important distinction. Besides there were no words importing an assumption of the mortgage by the grantee.

Belmont agt. Coman (22 N. Y., 438) is clearly distinguishable from the case before me, in respect to the language of the *habendum* clause. There was no assumption of the mortgage by the grantee.

It is, however, argued by the defendants' counsel that it does not clearly appear upon whom this assumption rests.

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I think that it rests upon the grantee who was to pay the whole consideration, of which the mortgage in question formed a part.

The grantor was already liable for the mortgage debt. He was the mortgagor and it was the intention of the parties in the transaction that the person to whom the equity of redemption was transferred should assume and pay it.

It must be held, therefore, that the defendant is personally liable for any deficiency and there must be judgment accordingly.

Munson agt. Dyett.

SUPREME COURT.

MARY I. MUNSON and others, executors, &c., agt. MARY I.
DYETT and others.

Mortgage—Assumption of payment thereof—when married woman not liable—covenant to one not liable to pay—Costs.

Where a husband purchased land, incumbered by a mortgage, and directed that the deed be made out in the name of his wife, he intending to make her a gift of the land; the deed contained a covenant, on the part of the grantee, to pay the mortgage; the wife was, however, ignorant of the transaction, and had no knowledge of the deed or its covenant; it appearing that the husband paid, with his own funds, the consideration on the purchase, and, in like manner, discharged the taxes and assessments:

Held, that the wife, on a foreclosure of the mortgage, was not liable for any deficiency arising on the sale.

Although a married woman may enter into engagements with respect to her separate estate, there is nothing in the marital relation which authorizes a husband, without his wife's knowledge or assent, to create an estate in lands in her and charge her personally with a covenant in respect thereto.

Where the grantor in a deed is not himself liable to pay a mortgage upon the land, his grantee is not liable to pay the same to the holder thereof, although, by the conveyance to him, he assumes its payment. A promise to pay an incumbrance, of which the holder can take advantage, must be made to one who is liable to pay.

Special Term, December, 1878.

Erastus F. Brown, for plaintiff.

A. J. Vanderpoel, for Mrs. Dyett.

Richard S. Newcomb, for defendant, Bernstein.

Munson agt. Dyett.

VAN VORST, *J.*— This is an action for the foreclosure of a mortgage, in which it is sought to hold the defendants, Mary J. Dyett and Isaac Bernstein, for any deficiency which may arise on the sale of the mortgaged premises.

With respect to Mrs. Dyett, it is claimed that she is so liable, for the reason that Pecase, the mortgagor, conveyed the mortgaged premises to her, and that by the covenants contained in the conveyance, she, as grantee, assumed the payment of the mortgage.

When the conveyance was made to her, Mrs. Dyett was a married woman. The facts in respect to this conveyance may be shortly stated thus :

Her husband purchased the land from Pecase, and furnished all the consideration over and above the mortgage.

Without any communication with, or direction from, or knowledge of, his wife, but with the intention on his part of making her a gift of the premises, her husband directed that the deed should be made to his wife.

The deed of conveyance declared the premises to be conveyed subject to the mortgage in question, which, by the terms of the deed, the grantee assumed to pay, the amount being deducted from the purchase-money. Mrs. Dyett never saw the deed, and knew nothing of its existence or of its terms.

She had no separate estate at the time, except such as was created by this deed, and some other lots in an upper ward of the city. Her husband paid the interest on the mortgage with his own funds, together with the taxes, and without any direction from his wife.

The title stood in this way for over one year, when her husband made a new arrangement with Pecase, by which he agreed to take back the land. And it was reconveyed, the purchaser assuming the payment of the mortgage. Upon the reconveyance, for purposes of his own, Pecase desired that the name of the grantee should be left blank, but it was afterwards filled in with the name of one Goldsmith.

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This conveyance was executed by Mrs. Dyett, but it does not disclose on its face that Mrs. Dyett had any interest except a right of dower.

It is a deed from Dyett and wife, in which she relinquishes her claim and right of dower.

I do not think that these facts justify a judgment against Mrs. Dyett for any deficiency in proceeds arising on the foreclosure of the mortgage.

Although, under the authorities, it is not necessary to bind a grantee to an assumption clause in a deed, that he should have signed the deed (*Wales agt. Sherwood*, 52 *How P. R.*, 413 and cases cited), yet it should appear that the undertaking to pay a mortgage therein provided for, was his act and agreement.

An acceptance of the deed, and entering into possession thereunder, would be evidence that it was his undertaking by which he would be bound (*Atlantic Dock Co. agt. Leavitt*, 54 *N. Y.*, 35).

Her husband, unless authorized by her to enter into such an undertaking for her and to accept a deed containing such covenant, could not bind her by an obligation of this nature contained in the deed. She was in complete ignorance of the whole transaction.

It is true that she was asked to, and did, join in a conveyance of the property to Goldsmith, but there is nothing to show, in the evidence, that she then knew that the title to the land stood in her name. There is nothing in the deed she signed to show that she approved or adopted, by such act, the taking, by her husband, of the title in her name or that she ratified the insertion, in the deed, of an obligation, on her part, to pay this mortgage. Although a married woman may enter into engagements in respect to her separate property, there is nothing in the marital relation which authorizes a husband, without his wife's knowledge or assent in this way, to create an estate in her and charge her personally with covenants in respect to it, of the very existence of which she

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remains in ignorance (*Culver agt. Badger*, 29 *N. J. Eq.*, 74). Other points are raised by this defendant, which are urged as fatal to the plaintiff's claim, but it is not necessary to pass upon them in view of what is above stated.

I conclude, therefore, that Mrs. Dyett is not chargeable with any deficiency; and this result also disposes of the claim interposed by the plaintiff against the defendant, Bernstein. For if the grantors in the deed to Goldsmith were not liable to pay the mortgage, the obligation of Goldsmith to them in respect to the payment of the mortgage does not inure to the holder. A promise to pay, of which the holder of the mortgage can take advantage, must be made to one liable to pay the debt (*Gurnsey agt. Rogers*, 47 *N. Y.*, 233; *Wise agt. Fuller*, 29 *N. J. Eq.*, 266; *Vrooman agt. Turner*, 69 *N. Y.*, 280). In this view, therefore, the defendant Bernstein's promise to Goldsmith, who was not liable, cannot be enforced by the plaintiff.

There should be judgment of foreclosure and sale, but neither Mrs. Dyett nor Bernstein are held for any deficiency. The plaintiff is entitled to costs against the mortgagor. In regard to the claim of the defendants, Mrs. Dyett and Bernstein, for costs, I hesitate, somewhat. But, upon the whole, I think that they are entitled to costs against the plaintiff, subsequent to their answers. The plaintiff was justified, from the condition of the record, in making them parties and interposing her claim; but when the answers were in, she should have investigated the matter and not insisted upon the trial that they were liable.

Gano agt. McCunn.

NEW YORK SUPREME COURT.

JAMES M. GANO, as executor and trustee of the last will and testament of **JOHN H. McCUNN**, agt. **THOMAS McCUNN** and **JANE W. McCUNN**, individually and as executor and executrix of, and trustees under, the last will and testament of **JOHN H. McCUNN**, deceased, **JAMES McCUNN** and others.

Will—construction of—Suspension of the power of alienation—Equitable conversion.

Where a testator, who died leaving a wife, brothers and sisters, by the fifth clause of his will devised his real and personal estate to his wife, as executrix, and two other persons as executors in trust, to take possession of the same and collect the rents, issues and profits thereof, and out of the proceeds of the same, for six years after his death, to pay certain bequests to his wife, brothers and sisters, the balance of the income, after paying such bequests, to be applied in the payment of any incumbrances or taxes on said property; at the end of six years the executors were directed to sell, and dispose of, all his estate, both real and personal, the proceeds of the same to be divided amongst his heirs and next of kin as directed:

Held, that the said clause in the will of the testator is void, because it suspends the power of alienation in a manner, and for a term, prohibited by the statute, and that the property, sought to be disposed of, thereby descends to the testator's heirs at law as if he had died intestate.

No absolute term, however short, can be maintained. Hence, a bequest of his real and personal estate directing that the issues and profits shall be applied to certain beneficiaries, for six years after the testator's death, and that then the same shall be sold and the proceeds divided among his heirs and next of kin, is void.

The testator attempted, by means of a trust to receive rents and profits, to render his lands inalienable, for the term of six years from the time of his death. This he could not do as the statute forbids it, and the whole trust estate and the remainder limited upon it, are consequently void. Nor can the provision be upheld by a resort to the doctrine of equitable conversion. The rule of equitable conversion of real into personal or personal into real estate, does not operate until the time arises when the

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conversion is directed to take place, which, in this case, would be six years from the death of the testator.

Special Term, January, 1879.

W. W. McFarland, for plaintiff.

Mitchell & Mitchell, for defendants.

C. Fine and S. Jones, for the heirs at law.

LAWRENCE, *J.*—This action is brought by the plaintiff, as the executor and trustee under the last will and testament of the late John H. McCunn, to obtain a construction of said will and an adjudication as to the validity of the fifth clause thereof, it being alleged by certain of the heirs at law that the said clause is void as contravening the provisions of the statute in relation to the suspension of the power of alienation (1 *Rev. Stat.* [*Edmonds*], p. 672).

The clause in question reads as follows: Fifth. "I give, devise and bequeath to my executor and executrix hereinafter named, and to the survivor of them, all the rest, residue and remainder of my estate, both real and personal, in America, in trust, as follows, that is to say: They shall take possession of the same and collect the rents, issues and profits thereof, and out of the proceeds of the same, for six years after my death, shall first pay the following bequests: To my dearly beloved wife, the sum of two thousand dollars per year; to James McCunn and Thomas McCunn, my brothers, each two hundred and fifty dollars per year; and my sister, Jane McCrea, one hundred and fifty dollars per year; to my sister Sally, now Mrs. Long, my sister Nancy, now Mrs. Barnes, both residing in Ireland, the sum of sixty dollars per year; and to my aunt, Eliza Lecky, sister of my mother, thirty dollars (\$30) per year. All the above annuities, beginning with my wife's of two thousand dollars, are to continue for the said term of six years after my death. The balance of such income, after paying the above yearly sums, to be applied in the paying of any incumbrances or taxes on said

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property. At the end of six years as aforesaid, or within a reasonable time thereafter, so that the same may not be sacrificed at low prices, I direct my executors hereinafter named to sell and dispose of all my estate, both real and personal, and after the sale of said property, the proceeds of the same to be divided amongst my heirs and next of kin, or to those to whom I may direct, as follows:

"First. One-half of the whole of the proceeds thereof to be given to my dearly beloved wife, the same, together with the other devises to her, as above set forth, to be in lieu of all dower and all right of dower. If my said wife should die before the distribution of my said estate, then her half to be divided equally between her two sisters, Caroline M. and Irene May, my brother-in-law, John K. Waring, and my two brothers, Thomas and James McCunn, share and share alike. The remaining half of the balance of my said estate, after such sale and after paying the legacies hereinafter mentioned, to be given to my two brothers, James and Thomas, equally between them, share and share alike. If either of my two brothers should die before the distribution of my said property, and leave no children, then his or their share shall go to the survivor or his children out of the half that my two brothers are to have. There shall be paid, before distribution thereof, to each of my sisters, Jane McCrea, Sally Long and Nancy Barnet, the sum of three thousand dollars each."

At the trial I was strongly of the impression that the objections urged against the validity of this clause were well taken, and such impression has been confirmed upon reflection and after a perusal of the very instructive briefs furnished to me by counsel.

The learned counsel who seek to sustain the will, contend that the provision can be upheld by a resort to the doctrine of equitable conversion. But I do not see how that doctrine can be successfully invoked. The rule of equitable conversion of real into personal or personal into real estate, does not operate until the time arises when the conversion is directed to take

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place (*Ross* agt. *Robert*, 2 *Hun's Report*, 90; *Savage* agt. *Burnham*, 17 *N. Y.*, 569; *White* agt. *Howard*, 46 *N. Y.*, 144; *Shumway* agt. *Harmon*, 6 *Thompson & Cook*, 626; *Bunce* agt. *Vandergriff*, 8 *Paige*, 37).

The conversion, therefore, cannot in this case take place until the expiration of six years from the death of the testator. Since this case was decided, the general term of this department, in the case of *Garvey* agt. *McDevitt*, have passed upon several of the questions which are involved in this case. In that case the will contained the following provisions :

"Fifth. All the rest, residue and remainder of my personal estate of whatsoever kind and nature, I give and bequeath to the Roman Catholic bishop of the diocese of Raphoe, parish of Rye, county of Donegal, Ireland, in trust, nevertheless, for the purposes hereinbefore mentioned.

"Sixth. I order and direct my executors hereinafter named, or such of them as shall act, or the survivor of them, at the expiration of four years after my decease, to sell, either at public or private sale, and for the best price they can obtain for the same, all my real estate, howsoever and wheresoever the same may be situated, and to give good and sufficient deed or deeds for the same, and pay over the proceeds arising therefrom, after paying the expenses of the sale thereof and all liens and incumbrances thereon, to the said Roman Catholic bishop of the diocese of Raphoe, parish of Rye, county of Donegal, Ireland, in trust nevertheless for the purposes hereinafter mentioned.

"Seventh. I hereby order and direct, and it is my will that the money bequeathed and ordered to be paid to the said bishop of the diocese of Raphoe in and by the fifth and sixth items of this my will, shall be used by him for the following purposes, namely :

"For the purpose of a site for, and the erection and maintaining of, a school-house thereon for the benefit of the Roman Catholic children of the parish of Rye, said school to be erected and built in the parish of Rye, county of Donegal,

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Ireland, to have and to hold the same to said bishop and his successors forever.

"Tenth. I order and direct that until my real estate is sold as hereinbefore directed, my executors hereinafter named rent my said real estate, and after paying all taxes, assessments, water rents, insurance and other charges thereon, to deposit the balance of the rent received from said premises in some good savings bank in the city of Brooklyn, and the said money so deposited by them shall form a part of my residuary estate, and be payable with the proceeds of the sale of the real estate as hereinbefore directed."

In that case, which had been transferred from the second department, justice BRADY, in delivering the opinion of the court, says: "Three opinions have been written in this case; one by justice BARNARD, who presided at the special term, against the validity of the trust, and one by each of the justices presiding at the general term, namely, justice GILBERT and DYKMAN. They all united in declaring that the trust created by the sixth and tenth clauses is invalid, because it is in conflict with our statute against perpetuities. The power of alienation is suspended by it, beyond the period allowed by law. Justice GILBERT, while admitting this, is decidedly of the opinion that it is nevertheless valid as a power in trust, by virtue of the fifty-eighth and fifty-ninth sections of the statute (1 R. S., 729), which provide that where an express trust shall be created for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees; but the trust, if directing or authorizing the performances of any act which may be lawfully performed under a power, shall be valid as a power in trust, and that in every case where the trust shall be valid as a power, the land to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust. Justice DYKMAN discusses this proposition and rejects it. He thinks that the sections mentioned apply only to cases where express trust shall be created for any purpose not enumerated in the statute;

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so that where an express trust has been created which is enumerated and is of a kind permitted, their provisions can have no application. And he has further expressed himself: 'It certainly would be a very strange construction of this provision of the statute to hold that, in any case where a testator has impressed his property with a trust of a nature and kind permitted by our statutes, but which cannot be carried out as a trust because it suspends the power of alienation improperly, it may yet be carried out and executed as a power in trust. Under such a construction a trust which fell under the condemnation of the statute against perpetuities would incur no peril, and that statute would be practically repealed. Such is not and cannot be the proper construction of this provision. The legislature provided that express trusts may be created for purposes which are clearly defined and enumerated, and abolished all others; but the acts which may be done under a power are not defined, and as it was manifest that express trusts might be created for purposes not enumerated, but which might be lawfully performed under a power, such trusts were made valid as powers and trusts; but they must be such as are not enumerated in the fifty-fifth section. This construction is in full harmony with the case of *Downing* agt. *Marshall* (23 N. Y., 366).'

"These views state the result of an investigation of the subject, and are sustained by authority and by principle. The attempted trust is condemned by the statute. If all the other necessary elements to its success were present it must fail because of the unlawful suspension of the power of alienation, and when it fails because of its absolute intrinsic invalidity it fails in all respects. The language of the statute is, 'Every future estate shall be void in its creation which shall suspend the power of alienation for a longer period than is prescribed in this title' (1 R. S., 723, sec. 14), and sections 58 and 59 only preserve trusts which authorize the performance of an act which may lawfully be performed under a power; but under a power no future estate can be lawful which in its

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creation shall suspend the power of alienation. The testator cannot accomplish indirectly what the statute declares he cannot do directly. The source of the power, in other words, must not be in contravention of positive statute law. It must rest on a legal foundation.

"If a trust prohibited by statute, and therefore void, can be carried out as a power, then, as suggested by justice DYKMAN, the statute defeats itself. It contains provisions which, in effect, repeal the prohibition, and the design of the enactment is destroyed. So far as the courts have adjudicated upon this question, the rule deducible is, that a trust prohibited because it suspends the power of alienation is equally invalid as a power in trust. In the case of *Hone's Executors*, agt. *Van Schaick*, (20 *Wend.*, 566), justice BRONSON said: 'Every estate is void in its creation, which is so limited that the absolute power of alienation may be suspended for more than two lives in being at the creation of the estate. The lives must be designated and life must in some form enter into the limitation. No absolute term, however short, can be maintained. The testator attempted, by means of a trust to receive rents and profits, to render his lands inalienable for a term of which more than nineteen years remained unexpired at the time of his death. This he could not do. The statute had forbidden it. The whole trust estate and the remainder limited upon it are consequently void (*Coster* agt. *Lorillard*, 14 *Wend.*, 265; *Hawley* agt. *James*, 16 *id.*, 61). The power, in trust, to make partition at the end of the term is subject to the same objection as the trust. It works an illegal suspense of the power of alienation. That this may be the effect of a power in trust, and that the power will then be void, has been adjudged by this court in the cases already mentioned.' In this case the power in trust works a suspension of the power of alienation, because of the four years' limitation or condition by which it is governed (*See, also, Ellis* agt. *Lynch*, 8 *Bosw.*, 478). In *Beekman* agt. *Bonsor* (23 *N. Y.*, 317) chief justice COMSTOCK thus briefly disposes of a kindred question to the

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one under discussion. At the end of the fifteen years, the executors were authorized to sell the land and distribute the proceeds among the nephews and nieces. This would have been a lawful trust or power in trust, if the postponement of its execution for an absolute period of time did not suspend the power of alienation in a manner which the statute does not permit. That suspension is fatal to this trust also.

"The same learned justice, in an elaborate review of the doctrine of powers, said: And thus, as the old statute of uses, which was intended to abolish positive trusts, left the widest field for the creation of active ones, so our provision in abrogating all active trusts, except the few particularly specified, has reanimated them under the names of powers which are left without restriction, provided the purpose of the limitation or power be itself a lawful one (*Downing agt. Marshall*, 23 N. Y., 380).

"The question thus considered seems to be decidedly adverse to the validity of the power in trust, and leads to the conclusion that the opinion of justice DYKMAN is entitled to the greater weight, and that the judgment therefor be confirmed. The provisions of the will establishing neither a valid trust nor power in trust, the design of the testator cannot be carried out."

I have quoted thus extensively from the opinion of the general term, in the case above referred to, because it seems to me to be on all fours with the case at bar, and to so effectually dispose of the views presented by counsel in support of the validity of the fifth clause of the testator's will in this case as to render further discussion by me unnecessary.

There should be judgment, therefore, in this case declaring that the fifth clause in the will of the testator is void, because it suspends the power of alienation in a manner and for a term prohibited by the statute, and that the property sought to be disposed of thereby descends to the testator's heirs at law, as if he had died intestate.

The findings may be settled on five days' notice.

Steuben County Bank agt. Alberger.

COURT OF APPEALS.

THE STEUBEN COUNTY BANK agt. J. L. ALBERGER and others, impleaded, &c., and LOUISA F. ALBERGER, a creditor by judgment.

Attachment — motion by judgment creditor to vacate — right of plaintiff to oppose by new affidavits — Code of Civil Procedure, §§ 682, 683.

A plaintiff cannot, on a motion to vacate an attachment, introduce new proof to sustain or fortify the grounds upon which it was issued, where the motion is founded upon the papers upon which the warrant was granted.

Where the motion to vacate was made by a lienor or judgment creditor upon an affidavit setting out her judgment, &c., upon the ground of alleged insufficiency of the original affidavits upon which the attachment was granted:

Held, that the fact of the lienor having made an affidavit showing the existence of her lien, which was attached to the motion papers and referred to in the notice of motion, did not make the motion one "*founded upon proofs, by affidavit on the part of the defendant*," within the meaning of section 683 of the Code of Civil Procedure, so as to entitle the plaintiff to support the attachment by new affidavits (*Reversing S. C.*, 55 *How.*, 481).

Decided November 12, 1878.

THE facts fully appear in case as reported in 55 *Howard*, 481.

A. G. Rice, for appellant.

J. F. Parkhurst, for respondent.

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ANDREWS, J.— On the 29th day of November, 1877, an attachment was issued by the county judge of Steuben county against the joint and several property of Samuel F. and John L. Alberger, in an action brought, by the plaintiff, against them and other defendants, and was levied upon the real and personal property of the defendant, Samuel F. Alberger. The attachment was issued upon affidavits presented to the county judge, tending, as the plaintiff claimed, to establish that the defendants, Samuel F. and John L. Alberger, were about to assign, dispose of, and secrete their property, with intent to defraud their creditors; and this was the ground of the attachment recited in the warrant. The plaintiff recovered judgment in the action against the Albergers, December, 4, 1877. On the 3d of December, 1877, Samuel F. Alberger confessed a judgment in favor of Louisa F. Alberger, and on the next day an execution thereon, was duly issued and levied on the attached property. Louisa F. Alberger, the plaintiff in this judgment, thereupon moved to vacate the attachment in the bank suit, as to the individual property of Samuel F. Alberger, on the ground of the insufficiency of the affidavits upon which it was issued. The notice of motion specified that the motion would be made upon the warrant of attachment, the affidavits upon which it issued, and the affidavit of Louisa F. Alberger, served therewith. The latter affidavit stated the granting of the attachment and the levy thereunder, and set out the recovery of the judgment, in favor of the affiant, and the execution and levy as hereinbefore stated. It did not controvert any of the facts, alleged in the affidavits, upon which the attachment issued, and was made solely for the purpose of showing the right of the affiant, as lienor, to intervene in the proceeding. The bank, on the hearing of the motion, offered to read additional affidavits in support of the attachment, and to fortify the ground upon which it was issued. The counsel for the moving party objected to their being read on the ground that the motion was founded on the affidavits upon which the attachment was granted, and that additional affida-

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vits, upon the merits of the original application, were not admissible. The court overruled the objection and permitted the affidavits to be read, and subsequently, without passing upon the sufficiency of the original affidavits, held and decided that the subsequent affidavits established the ground stated in the warrant of attachment, and for this reason refused to vacate it.

The correctness of the ruling depends upon the construction of sections 682 and 683 of the Code of Civil Procedure. Before considering these sections it is proper to refer to the prior law and practice in respect to vacating attachments.

Section 241, of the Code of 1848, as amended in 1869, provides that the defendant may move to discharge an attachment as in case of other provisional remedies. There was no further provision on the subject in the chapter relating to attachments.

The right of a defendant, against whom an order of arrest or an injunction order had issued, to have them vacated on motion, was declared in the chapter relating to those remedies (*Secs. 224, 225*). In both of those cases it was expressly provided that if the application was made on affidavits, on the part of the defendant, the plaintiff might oppose the same by affidavits or other proofs in addition to those on which the order was granted, *but not otherwise* (*Secs., 205, 226*).

In analogy to the practice in these cases, and by force of the clause in section 241, which has been cited, it was held that where an application to vacate an attachment was made on the papers on which the attachment was issued, new affidavits, on the part of the plaintiff, to support the attachment, could not be read on the motion (*Yates agt. North, 44 N. Y., 271*). The right to move to vacate an attachment, or other provisional remedy, was, by the section of the Code referred to, given to the defendant in the action; and it was held that a third person, although a creditor, could not move to vacate an attachment for insufficiency of the affidavits on which it was granted (*Morgan agt. Avery, 7 Barb., 656; In re Gris-*

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wold, 13 Barb., 412; *Isham* agt. *Ketchum*, 46 *id.*, 43). The court could, however, in virtue of its general jurisdiction over frauds, interfere and set aside attachments collusively obtained in fraud of creditors (*Frost* agt. *Mott*, 34 N. Y., 253).

Having in view the state of the law, in respect to the vacating of attachments when the new Code was enacted, we are to consider what changes have been made by the legislature. Section 682 enacts a new rule in respect to the right of third persons to intervene by motion to vacate an attachment. It provides that the defendant, or a lienor, who has acquired a lien upon, or interest in, the property of the defendant after the attachment, may apply to vacate, or modify, the warrant, thus extending the remedy by motion to vacate, which was before confined to the defendant, to persons having liens on the attached property, acquired subsequent to the attachment. There is no discrimination in this section in respect to the grounds upon which the application may be made, depending upon the fact whether it is made by the defendant or a *lienor*. The right to make the motion is given by the same clause to each class of persons mentioned, and unless the section is qualified by some other provision of the statute, we think the court cannot make such a discrimination, or declare that while the defendant may proceed on the ground of the insufficiency of the affidavits, a lienor is confined to the question of fraud.

Section 683 provides before what court or judge, and how, the motion may be made. It says: "An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted, in which case it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper, or it may be founded upon proof, by affidavit, on the part of the defendant, in which case it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the

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court, upon notice, and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy * * * in which case the plaintiff may show any matter in avoidance thereof which he might show upon the trial." This section, I think, continues the distinction which before existed and gives to the moving party the option to make his application to vacate the attachment, either upon the papers upon which it was granted alone, or upon proofs, on his part, and confines the plaintiff, in the one case, to the original affidavits and allows him, in the other, to sustain, by new proofs, his right to an attachment upon any of the grounds stated in the warrant. It is claimed, by the learned counsel for the plaintiff, that the clause in the second sentence commencing, "and it may be opposed &c," applies to the whole preceding part of the section and that it was the intention of the legislature, in all cases, to give the plaintiff the right to support his attachment by new affidavits. But this view is inadmissible. The punctuation of the section is opposed to it and, what is of more importance, the supposed intention is inconsistent with the provision in the first clause of the section which allows a judge to hear the motion, without notice, when it is made on the papers upon which the warrant was granted, in which case the plaintiff would have no opportunity to present fresh affidavits.

The rule that the plaintiff cannot, on a motion to vacate an order granting a provisional remedy, use new affidavits, when the motion is made on the original papers, is applied by the new Code to a motion to vacate an injunction order (*sec. 627*) and an order of arrest (*Sec. 568*). The fact that, by the amendments of 1877, the legislature amended section 568, so as to more distinctly indicate the intention that the application to vacate an order of arrest, when made upon the original papers, should be heard on those papers only, does not, we think, justify a different construction of section 683.

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Having reached the conclusion that the plaintiff cannot, on a motion to vacate an attachment, introduce new proofs to sustain or fortify the grounds upon which it was issued, where the motion is founded upon the papers, upon which the warrant was granted, it only remains to determine whether the motion in this case was founded upon proof, by affidavit, on the part of the defendant, within the meaning of section 683. We concur in the opinion of the court below, that the word *defendant* in this section, designates the party making the motion, whether the party to the record or the lienor.

The claim is, that the lienor having made an affidavit showing the existence of her lien, which was attached to the motion papers, and referred to in the notice of motion, the motion was one "founded upon proof, by affidavit, on the part of the defendant," and entitled the plaintiff to support the attachment by new affidavits. We are of opinion, that this did not make the motion one "founded upon proof, by affidavit" on the part of the defendant, within the meaning of the section. Such a construction would make it impossible for a lienor to move on the papers on which the warrant was granted, under the first clause of the section. The affidavit was made to show the right of the party making the motion to move, and to give her a standing in court. The fact proved was wholly extrinsic to the merits of the controversy. It was a preliminary fact, shown to give the court jurisdiction of the proceeding. The affidavit did not touch the right of the plaintiff to the attachment, and the motion was, we think, founded, within the meaning of the section, on the papers upon which the warrant was granted.

In this view, the ruling of the court, in admitting the new affidavits, was erroneous; and the order of the special and general terms should be reversed, and the case remitted to the special term, to pass upon the question of the sufficiency of the affidavits upon which the attachment was granted.

All concur; MILLER and EARL, JJ., absent at argument.

McLean agt. Hoyt.

SUPREME COURT.

HECTOR McLEAN as assignee, &c., agt. JOSEPH B. HOYT.

Readjustment of costs—where costs have been adjusted without notice—what relief party entitled to—must be asked for in one motion.

A party complaining of any proceeding in a cause, must embody all his objections in one motion; the court will not permit him to make separate motions for each objection he may have to make.

Where costs had been adjusted and inserted in the judgment without notice of adjustment, on motion by plaintiff for an order setting aside the adjustment of costs and for readjusting the same, it is not only competent but under the practice, as settled, the plaintiff has the right to require, as part of the order, a provision for the amendment of the judgment and docket.

But where, upon a motion for readjustment, the moving party neglects to include this provision in the relief sought, a subsequent motion, for such purpose, will be denied.

Monroe Special Term, August, 1878.

MOTION, by plaintiff, to amend judgment by deducting therefrom the item of ten dollars costs taxed and included in the judgment, or that the judgment, as to costs, be reduced by deducting therefrom ten dollars, and judgment roll and docket be accordingly amended.

J. Van Voorhis, for motion.

T. Bacon, opposed.

ANGLE, J.—In *Watson agt. Gardner* (50 N. Y., 671) the reporter's note represents the court as holding that where a

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readjustment of costs is ordered the amount of any reduction should be deducted from the judgment. In *Tracy agt. Humphrey* (1 *Code Rep.* [N. S.], 197) costs had been adjusted and inserted in the judgment without notice of adjustment; afterwards notice of readjustment was served with an offer to indorse on the execution the costs disallowed on the readjustment, then a motion was made to set aside the judgment for irregularity in adjusting costs without notice; the motion was denied and in the opinion it is said "but the plaintiffs, before proceeding to enforce said judgment, are to give fresh notice of adjustment of costs and deduct from the execution whatever amount shall, on such readjustment, be deducted from the costs. *The record and docket of judgment must be amended if any deduction be made on such readjustment.*"

I have underscored the portion of the opinion more pertinent to the present motion. In *Potter agt. Smith* (9 *How.*, 262, 265) the court at special term quote, as above, from the opinion in *Tracy agt. Humphrey*, and justice HARRIS concludes by saying "I think such should be the settled practice of the court." This practice is approved in *Champion agt. Plymouth Cong. Society* (42 *Barb.*, 441-444). Following the above opinions, as properly stating the practice, this motion should be granted in some form unless another point, made by defendant's counsel, is well taken, viz., that the special term orders of November 26, 1877, and of May 30, 1878, stand in the way. The order of November 26, 1877, recites that "the plaintiff, having moved at this term for an order setting aside the adjustment of costs in this action and for readjusting the same and for other relief," after hearing counsel, &c., and the reading of affidavits, &c., the order proceeds "and the defendant, having stipulated to deduct ten dollars, being the term fee for October term, 1875, from the amount of costs included in the judgment herein, and having filed such stipulation with proof of the service of a copy thereof on plaintiff's attorney, ordered that said motion be and the same is hereby denied, but without costs."

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The order of May 30, 1878, does not appear to need special consideration in this connection, for it clearly does not stand in the way of the present motion either when its subject-matter or its form is considered, so that this question turns upon the force to be given to the order of November 24, 1877, and, in that connection, a stipulation should be considered which defendant's attorney served on plaintiff's attorney, dated December 24, 1877, viz.: "The defendants, in the above entitled action, hereby stipulate to deduct ten dollars from the amount of costs included in the judgment herein."

This stipulation has been served since the date of the order of November 26, 1877, and it is among the moving papers here and it is probably the stipulation referred to in the order or grows out of it.

In the cases above cited (*from 1 Code Rep. [N. S.] and 9 How.*) the amendment of the judgment and docket was part of the relief granted on the motion to set aside the judgment; it was granted in connection with the order for retaxation of costs. It would not only have been competent, but, under the practice as stated in these cases, the plaintiff had the right to require, as part of the order on his former motion, a provision for the amendment of the judgment and docket. He had a right to include that in the relief sought by his first motion. This appears to me to bring the present motion under *Palmer agt. Mulligan* (2 *Cai. R.*, 380), *Desmond agt. Woolf* (6 *Leg. Obs.*, 389; *S. C.*, 1 *Code Rep.*, 49), *Mills agt. Thursby* (16 *How.*, 114), and it must be denied with costs.

Palmer agt. Ranken.

SUPREME COURT.

WILLIAM H. PALMER and another agt. HENRY S. RANKEN
and others.

Appeal—when will not be dismissed for failure to make case—Costs—in equity action—when court will not review the granting of.

An appeal will not be dismissed where the printed papers contain the judgment roll and exceptions, although no case is made.

On such appeal the court will not review the granting of costs in an equity action tried before a referee, unless the evidence is presented in a case, no matter how strong an equity the facts found make against the propriety of granting costs.

The propriety of granting such costs depends upon the evidence which appeared before the referee, and not upon the facts found by his report. Although the plaintiff substantially succeeds in an equity action, it is not error to allow the costs of the action against him, and the appellate court will not review such question unless the evidence is presented by a case.

Third Department, General Term, November, 1878.

Before LEARNED, P. J., BOCKES and BOARDMAN, JJ.

THIS is an appeal from only so much of the judgment as awards \$715.55 costs to the defendants in an equity action, notwithstanding the plaintiffs have substantially succeeded.

The plaintiffs made a case and proposed only a portion of the evidence. The defendants proposed to amend by inserting all of the evidence.

As it was voluminous the plaintiffs served a notice to waive the case and rely upon the report and exceptions thereto, and printed the same.

The defendants moved at the general term, held at Bing-

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hamton in May, 1878, to dismiss the appeal because the printed papers served did not contain the case, which motion was denied without costs. The case is now brought on for argument.

R. A. Parmenter, for the defendants, contended that the court should not hear the appeal unless the case was handed up as a part of the appeal papers.

E. F. Bullard, for the plaintiffs, claimed that the facts found and the decision of the referee presented the following facts :

The amended complaint avers the defendant Henry S. Ranken, put his brother Peter into the firm with the two plaintiffs and afterwards by their joint act the plaintiffs were defrauded.

The defendants procured the plaintiffs to give a chattel mortgage for \$8,656, October 6, 1871.

Afterwards H. Ranken & Co. procured Peter to give a second chattel mortgage in the name of the plaintiffs' firm for \$5,000, August 2, 1872, without their knowledge.

The defendants, H. Ranken & Co., without any demand, advertised to sell \$15,000 worth of machinery under said two chattel mortgages for February, 26, 1873.

They filed a renewal September 19, 1872, which was after they had taken the \$5,000 mortgage, claiming \$8,656.11 due on the oldest mortgage.

Just before this suit was begun, Peter gave a bill of sale of all the property to his brother's firm.

The plaintiffs alleged that less than \$4,000 was due the said Ranken & Co. on their mortgages.

The plaintiffs prayed that an account be taken of all sums due by the plaintiffs' firm to said H. Ranken & Co. and offered to pay any sum that should be adjudged to be due to said H. Ranken & Co. on said chattel mortgages or either of them, etc.

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The suit was begun February 25, 1873, only one day before sale was to take place on chattel mortgages.

The said H. S. and W. J. Ranken, by answer, aver that the \$5,000 mortgage was given to secure a pre-existing indebtedness, etc.

They aver that \$10,177.17 was due them on the two mortgages April 1, 1873, to which add interest to the date of report (August 10, 1877), making their total claim \$13,264.19, besides \$480 they claimed for costs on chattel mortgage.

The plaintiffs' whole property would have been sacrificed, under this claim, if this suit had not been commenced to restrain the sale. The defendants claimed affirmative relief and asked to recover the above amount.

The plaintiffs replied thereto.

By the report of referee it is found that these defendants induced Palmer to buy into this mill and assume an old debt of theirs of \$4,500.

The plaintiffs desired an honest partner with capital and defendants promised to aid them in procuring one. Henry S. Ranken, one of the firm of H. Ranken & Co., decided to put in his brother Peter.

September 20, 1870, it was agreed that Peter should be taken in as a partner with plaintiff, with restricted powers, among which it was agreed he should not sign the firm name or create firm liabilities, and that defendants would attend to the plaintiffs' financial business and see that their books were correctly kept.

That the defendants would be responsible for the conduct of said Peter.

That the plaintiffs were not experienced bookkeepers and supposed the books were correct until this action was commenced.

That the books were fraudulently kept by said Peter or by Clark, the agent of the other defendants, and the defendants knew of that fact, or might, with ordinary care, have known the same.

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That the defendants fraudulently procured the largest mortgage to be signed.

That about February twentieth the defendants advertised to sell under mortgages February 26, 1873, without the plaintiffs' knowledge, and claimed more than was their due, and would have sold, if they had not been restrained by injunction.

The said Peter and Clark made false entries.

The defendants knew or might have known of said frauds.

By reason of the fraud of Peter, and the negligence of the other defendants, the referee deducts \$6,303.04 from the amount claimed by them.

Instead of the sum claimed by defendants....	\$13,264 19
The referee allowed only	2,518 25
	<hr/>
	\$10,745 94
	<hr/>

The defendants, therefore, recovered only about one-fifth of the amount they claimed in their answer, but allowed defendants costs.

The plaintiffs excepted to the allowance of costs.

The plaintiffs have already paid the damages.

Mr. Bullard argued:

I. Upon the facts found it was unjust and inequitable to allow costs to the defendants. They made a fraudulent claim and would have sacrificed the plaintiffs' property in consequence of claiming an excessive amount if the plaintiffs had not brought this suit.

They have attempted to defraud the plaintiffs, and been convicted, and now ask the plaintiffs to pay the costs of their conviction. The plaintiffs should have been allowed costs.

II. The decision of the referee is subject to review in this

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court (54 *N. Y.*, 397; 70 *N. Y.*, 101; *Law* agt. *McDonald*, 9 *Hun*, 27; 10 *id.*, 273; 6 *W. Dig.*, 40).

III. At all events the most the defendant could claim in any view would be that no costs should be allowed to either party.

The plaintiffs, therefore, ask that the judgment be modified so as to allow the plaintiffs to recover the costs of this action and of this appeal to be adjusted; or, second, that the judgment below be modified by striking out the costs allowed to the plaintiffs. We claim the plaintiffs should be allowed costs of the appeal in either event.

THE COURT decided that the judgment must be affirmed, as it could not tell, from the report, whether costs had been properly allowed unless the evidence was presented, and that the propriety of granting such costs depends upon the evidence and not upon the facts found or the decision given. The plaintiff's counsel then asked for liberty to present the case, and it was granted upon payment of ten dollars costs and the cause put over the term.

Matter of assignment of Bryce & Smith to Lewis.

N. Y. COMMON PLEAS.

Matter of assignment of BRYCE & SMITH to FREDERICK LEWIS.

Assignment—Inspection of books, &c., of assignors—Examination of witnesses.

An order for the examination of witnesses and the production of any books and papers by any party or witness under section 21 of the act of 1877, chapter 466, may be had at any time, and is not necessarily confined to cases where a proceeding under the act is pending.

It is not necessary to allege or prove a demand and refusal of inspection in the petition.

An inspection, without an order made on petition, gives no right to file with the county clerk extracts from the books, nor to use them in proceedings under the act. An order must be obtained for the purpose and the application for it involves no reflection upon the assignee.

Special Term, January, 1879.

MOTION by National Park Bank, creditor, to set aside order of December 24, 1878, by which an order for the production of books, &c., was vacated.

J. F. DALY, J. — The order of December 13, 1878, directing the examination of Alfred D. Griswold, and directing the assignee to produce all books of account, papers and vouchers of the assignors, was authorized by the facts stated in the petition, then presented to the court. The twenty-first section of the act (*chap. 466, Laws of 1877*) authorizes the county judge, at any time, on petition of any party interested, to order the examination of witnesses, and the production of any books and papers, by any party or witness before him, or before a referee appointed by him for such purpose. This may be done "at any time," and is not necessarily confined to cases where a proceeding under the act is pending. The statute

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provides that the testimony, and extracts from the books and papers, shall be filed with the county clerk, to be used in any action or proceeding then pending, or which may hereafter be instituted. The provision is evidently designed for the obtaining of depositions, perpetuation of testimony and inspection of books and papers for use in any of the various proceedings that grow out of the administration of the assigned estate. Although the statute does not prescribe the proof necessary to authorize such order, it is clear that a necessity for the examination should be shown by the petition, otherwise the assignee might be perpetually obstructed in the administration of the trust by applications in which the books of the assignors, and the assignee's time might be wholly engrossed by examinations instituted by petitioning creditors.

The petition presented in this case, alleged that The Park Bank is a creditor of the assignors to the amount of \$18,314.60, upon nine notes indorsed by the assignors and discounted by the Park Bank about June, 1878; that, at that time, the assignors represented to plaintiff, that they were perfectly solvent and worth \$273,600, over all their liabilities; that on July 23, 1878, they made this assignment; that their schedules were filed September 27, 1878, showing a total indebtedness of \$352,979.59, and actual valuation of assets at \$121,411.61; that the assignee employed an accountant, Mr. Alfred D. Griswold, to prepare a balance sheet of the estate from the books, and that such sheet was inspected by an expert employed by the bank, who was of opinion, from a casual inspection, that either the representations of the assignors in June, 1878, were untrue, or the balance sheet was incorrect; that requests to inspect the books were made by petitioners who were, however, put off by excuses; and the petitioners charge a fraudulent concealment by the assignors of assets of the firm.

The charge was grave; a *prima facie* case was made out, and the ascertainment of the truth was not only of importance to all persons interested in the assigned estate, but would aid materially in carrying out the purposes of the assignment act.

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Judge VAN HOESSEN, therefore, on December 13, 1878, made an order requiring the accountant, Alfred D. Griswold, to appear and be examined before a referee, and requiring the assignee to produce, on such examination, the books and papers of the assignors. Mr. Griswold was evidently a "witness" within the meaning of section 21, and as the assignors were "parties," their books and papers were under the control of the court or judge. The examination under section 21 is itself "a proceeding," and every person interested in the estate who is required to submit to examination, or to produce books or papers, is a "party" to the proceeding. In a broader sense, however, the assignors, assignees, creditors and sureties are "parties" to all proceedings under the assignment act.

On December 24, 1878, however, judge VAN HOESSEN granted, *ex parte*, an order vacating the order above mentioned. This was done on motion of the assignee who presented to the court an affidavit denying that he ever refused to allow an inspection of the books; setting forth that there had been three meetings of creditors at which the bank was represented; that an advisory committee of creditors was appointed which fully examined all the books and papers of the assignors; that forty-five per cent had been offered in settlement at a meeting on September 10, 1878, and a composition agreement to that effect signed by the bank; that on 29th of August, 1878, a petition in bankruptcy against the assignors was filed by certain creditors, and that proceedings thereunder were still pending; and that a proceeding for composition was instituted, and a meeting called for January 10, 1879, before HENRY WILDER ALLEN, register in bankruptcy; that there was a recommendation of composition in bankruptcy at thirty-five per cent by a committee of the creditors; and finally, stating among other matters that the petitioners' proceeding was intended merely to harass and annoy the assignee and debtors, and to coerce the debtors into giving better terms to the bank than to other creditors.

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It is manifest that judge VAN HOESEN was justified in setting aside his order for the examination of Griswold, and production of the books, upon the fact coming to his knowledge that proceedings against the debtors were pending in the United States district court in bankruptcy, a fact which had not been disclosed by the petition of the bank. He regarded it as proper to permit no step that required his order or approbation to be taken after the United States court had taken cognizance of the matter in bankruptcy.

There seems to be no other reason than this discovery of the pending bankruptcy proceedings which would require the judge to vacate peremptorily and without notice to the petitioner, his previous order. The other matters stated in the affidavit of the assignee were such as would suggest the propriety of calling on the petitioner for answer, but not of vacating, *ex parte*, the order granted on the petition.

That this was the matter which operated to produce his decision would appear from the third order made by the judge, dated December 27, 1878, requiring the assignee to show cause why the order of December 24, 1878, should not be vacated and the examination originally directed be had. This last order to show cause was granted on a voluminous affidavit of Mr. Worth, president of the Park Bank, setting forth among other things that an injunction, which had been issued by the United States district court staying all proceedings before the referee, had been modified by said court after full hearing and argument, so as to allow the examination of the assignor's books and papers to proceed. The other matters set out in Mr. Worth's affidavit were in support of his original petition.

I regard the facts before the court as sufficient to authorize the examination originally ordered under section 21. The United States district court has expressly declined to interfere with that examination, and this court is bound in all proper cases to allow such remedies to the creditors as the act provides, and as do not conflict with the paramount authority of the bankruptcy court over the same assets.

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Much proof has been offered on this motion upon an issue which seems to be of minor importance; viz.: whether a demand for inspection was made upon the assignee and whether he refused it. If it were necessary to pass upon the question I should say that he is by no means convicted of an attempt to obstruct the creditors, and that he could not be so convicted upon the affidavits against him, some of which are open to severe criticism.

But it is not necessary, under section 21, to allege or prove a demand and refusal of inspection in the petition. It is of no importance, in considering the propriety of granting the prayer of the petition, that the assignee is and always has been willing to permit the inspection prayed for. An inspection, without an order made on petition, gives no right to file with the county clerk extracts from the books, nor to use them in proceedings under the act. An order must be obtained for the purpose and the application for it involves no reflection upon the assignee.

The main reason for the inspection of the books of these assignors yet remains: that, as set out in the petition on which the order of December thirteen was made, the representations alleged to have been made by the assignors as to their solvency, less than two months before the assignment, were such as to excite surprise when their schedule of assets is examined; and the creditors are not unreasonable in their demand for an investigation. No denial by the assignors of the alleged representations is made, although Mr. Bryce makes an affidavit on this motion, and I am justified in believing that a well founded distrust of the accuracy of the schedules is the ground of the petitioners' desire to examine the assignor's books, not a malicious desire to embarrass the debtors nor a corrupt design to extort a payment to the bank over and above the composition proposed for the creditors generally. I shall therefore direct that the order of December 24, 1878, be vacated and the examination under the order of December 13, 1878, be proceeded with. No costs.

Barber agt. Goodell.

SUPREME COURT.

NANCY BARBER and another agt. JAMES H. GOODELL and others.

Proof of service—death of deputy sheriff—substituted proof.

Where the summons and other papers were placed in the hands of a deputy sheriff, which he served, but died before making proof of service; on affidavits showing statements made by the deputy while he was sick, as to service, and the times and places, the sheriff was directed to make proof of service, under his certificate, in accordance with such affidavits.

Oneida Special Term, April, 1877.

MOTION to substitute proof of service. The summons and other papers were placed in the hands of a deputy sheriff for service on the defendants residing in his county, and he served them but died before making proof of service.

Affidavits were read on the motion showing statements made by the deputy sheriff, while he was sick and confined to his bed, as to service, and the times and places; of a defendant corroborating the statements so made, and others to the same effect.

S. L. Seabrook, for motion.

HARDIN, J.—Ordered that the affidavits be filed and that the sheriff of the county, in which the service was made, make proof of service, under his certificate, according to the affidavits read on the motion.

Whitcomb *et al.* agt. Fowle *et al.*

N. Y. COMMON PLEAS.

JOSIAH M. WHITCOMB *et al.* agt. JOSIAH F. FOWLE *et al.**Limited partnership — Assignment — Power of creditor to prevent a dissipation of copartnership assets.*

When a limited partnership becomes insolvent, its assets are a special fund for the payment of its debts ratably (except those due to the special partners), and any creditor, although he has not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver.

Where a limited copartnership made an assignment for the benefit of its creditors, in which the amount due the special partner was made a preferred claim, and subsequently an action was commenced by plaintiffs to have the assignment declared null and void; that a receiver be appointed, and for an injunction restraining any disposition of the property; pending this action, the assignee reassigned the copartnership property to the assignors, who then made an assignment to the same assignee without preference, who filed the schedule required by law, and executed a bond which was duly approved:

Held, that, although the authorities would seem to establish the theory that as between the parties to it, the assignment is binding and revokable at their pleasure, yet such a revocation could in no way prejudice or impair the rights of creditors. They had already commenced proceedings to protect their rights upon a statement of facts which should not be decided on affidavits.

If plaintiffs have asked for more or greater relief than the court can afford them on a final judgment, that is no reason why the court on a mere motion should try issues on the determination of which they may be entitled to some relief.

Special Term, January, 1879.

PRIOR to January 2, 1879, a limited copartnership existed under the firm name of "J. F. Fowle," of which the defendant Josiah F. Fowle was the general, and the defendant Wil-

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liam A. Brown, Jr., was the special partner. On the day last mentioned the said firm made an assignment for the benefit of its creditors to the defendant John H. Folk, in which the amount due the special partner was made a preferred claim. This action was then commenced in behalf of the plaintiff and other creditors who might come in and contribute to the expense thereof, to have the assignment declared null and void ; that a receiver of the copartnership property be appointed, and that an injunction issue restraining any disposition of such property. An order to show cause as to the appointment of a receiver and the granting of an injunction was made January 7, 1879, returnable January 8, 1879, the hearing of which was on that day adjourned to January 13, 1879, with the direction that no disposition of the property by sale was to be made by Folk, the assignee.

On January 7, 1879, Fowle (as appears by his affidavit) was served with the summons and complaint and the order to show cause in this action. On January 9, 1879, with the consent of Brown, Folk reassigned the copartnership property, and on the same day the said firm, with Brown's consent, made a new assignment to Folk for the benefit of its creditors generally, and without preference. Folk, as such assignee, subsequently filed the schedule required by law and executed a bond which was duly approved.

On the sixteenth of January, an order was entered appointing a receiver and granting an injunction.

Motion is now made for a stay of proceedings pending an appeal.

P. & D. Mitchell, for creditors, plaintiffs.

Childs & Hull, for assignee.

John Henry Hull, for Brown, special partner.

LARREMORE, *J.*— If this were an action in the nature of a creditor's bill, the plaintiffs would have no status in court without alleging the recovery of a final judgment and execu-

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tion issued and returned thereon (*Geery* agt. *Geery*, 63 *N. Y.*, 252 and cases there cited).

But I do not understand that the doctrine laid down in *Jones* agt. *Lansing* (7 *Paige*, 583) has been disturbed or disputed. That case holds that when a limited partnership becomes insolvent, its assets are a special fund for the payment of its debts ratably (except those due to the special partner), and any creditor, although he has not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver. This practice was reviewed and approved in *Van Alstyne* agt. *Cook* (25 *N. Y.*, 489).

If the plaintiffs have asked for more or greater relief than the court can afford them on a final judgment, that is no reason why the court on a mere motion should try issues upon the determination of which they may be entitled to some relief. If as general creditors they cannot (as contended) contest the validity of the assignment, yet as general creditors they may have the right to prevent a dissipation of the copartnership assets.

The authorities cited by the counsel for the defendants (*Hone* agt. *Woolsey*, 2 *Edw. Ch.*, 289; *Mills* agt. *Argahl*, 6 *Paige*, 577; *Metcalf* agt. *Van Brunt*, 37 *Barb.*, 621) establish the theory that as between the parties to it the assignment is binding and revokable at their pleasure. But no case goes to the extent of holding that such a revocation could in any way prejudice or impair the rights of creditors. In the case under consideration the creditors had commenced proceedings to protect their rights upon a statement of facts which should not be decided on affidavits.

Considering the hopeless insolvency of the firm, that its indebtedness to its special partner would almost if not entirely exhaust its assets, the peculiar relations of the assignee and the special partner, and also the entire merits of the application to remove the receiver and vacate the injunction, I think it should be denied.

Poughkeepsie Savings Bank agt. Winn.

SUPREME COURT.

THE POUGHKEEPSIE SAVINGS BANK agt. MARY WINN and others.

Mortgage foreclosure — taxes and assessments — rights of purchaser.

Where the judgment ordering the premises to be sold expressly provided that the referee should deduct from and pay out of the purchase-money any lien or liens for taxes or assessments, and only the balance should be paid to the plaintiff :

Held, that this provision is equivalent to an express declaration, by the court to the buyer, that he buys free from all liens for taxes.

Held, also, that although by the terms of sale the purchaser was required to present all claims for taxes, and have the same deducted from his bid, he could, if he saw fit, pay to the referee the entire purchase-money, and rely upon the court to carry out its own judgment as to the application of the moneys thus paid by him.

Where the purchaser paid to the referee the entire purchase-money, which was by him paid over to plaintiff, leaving certain taxes unpaid :

Held, that plaintiff should be compelled to pay the same.

Ulster Special Term, February, 1878.

MOTION to compel the plaintiff to pay certain taxes on property purchased at foreclosure sale.

Wm. Lawton, for purchaser.

R. E. Taylor, for bank.

WESTBROOK, J.—The judgment ordering the premises to be sold expressly provided that the referee, who conducted the sale, should deduct from and pay out of the purchase-

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money obtained thereon "any lien or liens upon said premises so sold at the time of such sale for taxes or assessments," and that only the balance of such money, remaining after such payments and sundry others required by the judgment, should be paid to the plaintiff. This provision is equivalent to an express declaration, by the court to the buyer, that he buys free from all liens for taxes.

That certain taxes are unpaid is not controverted, but it is claimed, that under the terms of sale, the purchaser was required to present all claims for taxes, and have the same deducted from his bid. Not having done so it is argued by the plaintiff, that it may retain the money paid to it though, confessedly, the taxes are unpaid. The soundness of this position is not seen. The party buying is presumed to know what the judgment required and to rely thereon. It is true that he had the right, by the terms of sale, to ascertain what taxes were outstanding, pay the same, and have the amounts paid credited upon his bid, and for this, such terms of sale expressly provide; but it is also true, that, he could, if he saw fit, pay to the referee the entire purchase-money and rely upon the court to carry out its own judgment as to the application of the money thus paid by him. There is nothing in the terms of sale which compels the buyer to take the premises subject to the taxes due thereon, provided he fails to pay them and have them deducted from his bid upon his settlement with the referee. The clause is for the purchaser's protection, allowing him to pay if he sees fit, and is not inconsistent with the right to pay over the whole purchase-price, and trust to the referee following the order of the court.

The motion must be granted with costs.

Lacustrine Fertilizer Co. agt. Lake Guano and Shell Fertilizer Co.

SUPREME COURT.

THE LACUSTRINE FERTILIZER COMPANY, appellant, agt. LAKE GUANO AND SHELL FERTILIZER COMPANY and others, respondents.

Appeal — not authorized from an order overruling or sustaining a demurrer — Code of Civil Procedure, §§ 1347-1350.

Under the Code of Civil Procedure an appeal cannot be taken from an order overruling or sustaining a demurrer.

The only remedy at the present time is by appeal from the judgment, final or interlocutory, as the case may be, entered upon the decision of law presented by the demurrer.

In this respect the new Code differs from the former one and abrogates the right to appeal from an order of that description which was introduced by an amendment of section 349, adopted in 1851.

Fourth Department, General Term, October, 1878.

APPEAL from an order of the special term in Seneca county, sustaining demurrers to the complaint with leave to plaintiff to amend on payment of costs.

F. L. Manning, Henry S. Bennett and Adolphus D. Pape (T. M. Morgan, attorney), for appellant.

J. T. Miller and H. C. Gardiner (John Cummins, attorney), for respondents.

SMITH, J.— The Code of Civil Procedure does not authorize an appeal from an order overruling or sustaining a demurrer. The remedy at the present time is by appeal from

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the judgment, final or interlocutory, as the case may be, entered upon the decision of the issue of law presented by the demurrer. In that respect the new Code differs from the former one and abrogates the right to appeal from an order of that description which was introduced by an amendment of section 349, adopted in 1851. The object of the change and the provisions of the new Code by which it has been accomplished are pointed out in Mr. Throop's note to section 1350 of the Code of Civil Procedure. One or two provisions of the Code as framed, which indicated very clearly the purpose of the commissioners to effect the change above stated, have been altered by the legislature, but the plan is not thereby materially interfered with.

Section 1201, which so defined an interlocutory judgment as to include the determination of the court upon a demurrer, was enacted in 1876, as reported by the commissioners, and was expunged in 1877. And section 1224, which, as reported and adopted in 1876, gave discretionary power to the general term upon a partial or entire affirmance of an interlocutory judgment on appeal, where no issue of fact remains to be tried, to render final judgment, unless it permits the appellant to amend or plead over, was changed in the following year by substituting the words "order or judgment" for "interlocutory judgment." It can hardly be supposed that these changes indicate a purpose to return to the former practice. The provision of section 849 of the old Code, as amended in 1851, was not restored, and section 1349 of the new Code stands providing for an appeal to the general term from an interlocutory judgment rendered at a special or trial term. The construction above indicated is fortified by other provisions of the new Code relating to proceedings subsequent to the decision of the general term on an appeal from an interlocutory judgment. Section 1336 provides that where final judgment is rendered in the court below after the affirmance upon an appeal to the general term of that court of an interlocutory judgment, the party aggrieved may appeal directly from the

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final judgment to the court of appeals, notwithstanding it was rendered at a special or trial term. The same section provides that such an appeal brings up for review only the determination of the general term affirming the interlocutory judgment. An appeal to review the final judgment in such a case may be taken to the general term, but on such an appeal the interlocutory judgment cannot be reviewed (*Sec.* 1350). But on appeal to the court of appeals from the determination of the general term, upon the appeal from the final judgment, the determination of the general term affirming the interlocutory judgment may be reviewed (*Id.*).

The difficulties existing under the former practice, which the provisions above referred to were designed to remove, are stated in Mr. Throop's note to section 1350. The object of these provisions would be frustrated in a great measure by allowing an appeal from an order sustaining or overruling a demurrer, as they would not apply to such an appeal. The present Code provides for the entering of an interlocutory as well as of a final judgment (*sec.* 1236) and directs that an appeal must be taken within thirty days after service of a copy of the judgment and notice of entry (*Sec.* 1351).

We have already held in accordance with these views in two cases (*Miller agt. Sheldon** and *Riggs agt. The American Tract Society*), decided last term, but as they have not been reported, we have thought it due to the present case to give the reasons for our decision.

The appeal must be dismissed but without costs.

Appeal dismissed without costs.

TALCOTT, P. J., and HARDIN, J., concur.

* Since reported, 15 Hun, 220.

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SUPERIOR COURT OF BUFFALO.

FRANKLIN LEE and THOMAS LOOMIS' agt. THE PITTSBURGH
COAL AND MINING COMPANY.

Corporation—contract made by president—proof of authority—ratification of—Evidence.

It is an established rule of law that corporations may enter into and become bound by contracts, express or implied, without other formalities than are requisite in respect to like contracts made by natural persons, and under the same circumstances and conditions. But corporations, of necessity, must act solely through the instrumentality of their officers or other duly authorized agents, and such officers and agents must, like the agents of natural persons, be deemed to be clothed with all the powers and authority necessary or proper to effectuate the purposes of their creation, in the manner, with the means and appliances, and according to the usages customary in the conduct of the business and affairs intrusted to them.

Where a corporation, in the execution of powers conferred by its charter upon its board of directors, had made M. the president and manager of the corporation, he entering into an agreement with plaintiffs by which they were to act as defendant's agents in the sale of coal, for which they were to receive a commission; in an action to recover for such commissions:

Held, that what general or special powers were by the board expressly conferred upon M., as such president and manager, can only be determined (in the absence of positive evidence), by inferences from such facts proved as throw light on this point, aided by the presumption that, as the chief executive officer and manager of the company, he must have been clothed with some powers and duties which, of necessity, pertained to those positions.

Held, also, that the same evidence upon which prudent business men ordinarily infer the existence of the authority ought to be sufficient and satisfactory to courts and juries.

Held, further, that it is not necessary to show authority by express resolution of the board of directors, or by power of attorney or other formal

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corporate action; but it is proper, on the question of authority, to prove various acts, statements and declarations, written and verbal, of the president and manager of the corporation, where it appears that they were done and made in the discharge of his duties, in the course of the company's business, and relating directly to current transactions therein.

Where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement.

Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be allowed to say that the original agreement was not made by a person legally authorized to contract.

General Term, March, 1877.

Before CLINTON, C. J., and SMITH, J.

Samuel S. Rogers, for appellant.

M. N. Whitney, for respondents.

SMITH, J. — This is an action to recover for commissions alleged to be due plaintiffs upon the sale of coal for defendant, under an agreement made with the plaintiffs by defendant's president and manager, in October, 1873, by which plaintiffs were to act as defendant's agents at Buffalo for the sale of its coal to Canadian railroads, and to receive a commission of ten cents per ton on all coal sold and delivered.

When the former appeal in this case was before us, we held, and are still of the opinion, for the reasons then given, that the plaintiffs, if entitled to recover for commissions on any part of the coal sold the Grand Trunk Railway company, were entitled to recover for the whole 30,000 tons.

On the trial, a conversation between plaintiff Loomis and defendant's president and manager, and certain letters from the defendant's secretary and treasurer to the plaintiffs, were

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received in evidence against the defendant's objection. We think they were properly received. Mullin, the president, in the conversation, and Wilson, the secretary, in writing the letters, were acting in the direct discharge of official duties in respect to the agreement made by Mullin for defendant with the plaintiffs, and the most efficient means to be taken for its performance. The correspondence and conversation were not casual or accidental, but for a definite purpose, in the furtherance of the defendant's business interests, with which both the plaintiffs and Mullin and Wilson were charged. They were a part of the *res gestæ*, as much so as the subsequent negotiations for the sale of coal to the Grand Trunk Company. The letters were also competent as evidence that the defendant had notice that the plaintiffs were employed as its agents, and of the acts of Mullin in that respect. In considering the objection to the evidence, we, of course, assume that the agreement made by Mullin, in behalf of defendant, with the plaintiffs was fully binding on defendant, as made by its authorized agent, or, at least, that the evidence on that subject was properly submitted to the jury, and this brings us to the remaining and most important question in the case.

In this case the defendant, in the execution of powers conferred by its charter upon its board of directors, had made Mr. Mullin the president and manager of the corporation, and Mr. Wilson its secretary and treasurer; they and three others composing its board of directors.

It is now the established rule of law in this country that corporations may enter into and become bound by contracts, express or implied, without other formalities than are requisite in respect to like contracts made by natural persons, and under the same circumstances and conditions. But corporations, of necessity, must act solely through the instrumentality of their officers or other duly authorized agents; and such officers and agents must, like the agents of natural persons, be deemed to be clothed with all the powers and authority necessary or proper to effectuate the purposes of their crea-

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tion, in the manner, with the means and appliances, and according to the usages customary in the conduct of the business and affairs intrusted to them.

What general or special powers were by the board expressly conferred upon Mr. Mullin as such president and manager, or what powers inhered in those offices, we can only determine (in the absence of positive evidence) by inferences from such facts proved as throw light on this point, aided by the presumption that, as the chief executive officer and manager of the company, he must have been clothed with some powers and duties which, of necessity, pertained to those positions, as it was shown that the business for which defendant was organized was the mining, shipping and selling of coal, that it had mines in Pennsylvania, and large quantities of coal for sale, which it sought to market in Buffalo and the neighboring province of Canada. We may fairly presume, further, that the defendant's president and manager had, by virtue of his offices, authority to make those contracts in defendant's behalf, which it was necessary that some agent should make for the prosecution of its business, and which the daily exigencies of that business might require. The hiring of operatives to carry on the work of mining coal, the making of contracts for the shipment of coal to the various markets, the employment of agents to receive and take care of coal at those markets, to attend to its sale, and to collect and remit the proceeds, were necessary to the operations of the corporation; and it was also necessary that some agent should be clothed with authority to make such agreements. The public would have the right to assume that the president and manager of the company claiming such authority, and exercising it, did lawfully possess it, and to treat with him accordingly. Upon similar presumptions all business men deal with the executive officers of banking, insurance, railroad, manufacturing and other corporations whose operations move the vast and complicated machinery of trade and commerce. Their boards of directors may, and, no doubt, often do, adopt rules

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and regulations defining the powers and duties of the various officers through whose agency the corporate powers and franchises are exercised. But such rules and regulations are usually to be found only upon the minutes of the directors' proceedings, or other private records of the corporation. They are not published, nor do the public, with whom the officers of the corporation transact business, know, or have the means of knowing, what such rules and regulations are. And it often happens — so often as to be the rule rather than the exception — that the chief officers of a corporation exercise a very wide range of powers, virtually grasping the entire direction and control of all its operations, with the tacit consent and approval of the corporation, though it has never by any direct vote or recorded act defined the nature or extent of their authority.

It is, therefore, very difficult, if not impossible, for those having dealings with corporate bodies to determine, except by circumstances and inference, what authority such officers have, or, in case of litigation, to prove their authority by positive evidence. Ought not the same evidence, upon which prudent business men ordinarily infer the existence of the authority, to be satisfactory to courts and juries? And would not the enforcement of more stringent rules embarrass and hinder the operations of trade and commerce, and prove vexatious and injurious to the interests of the corporations themselves?

These considerations lead to the conclusion that, under the circumstances of this case, the plaintiffs had a right to presume that the defendant's president and manager had lawful power to employ them as the agents of his company to sell its coal in this and the Canadian market, and to agree upon a reasonable compensation for their services. The defendant could only effect the sale of its coal through agents employed for that purpose, and those agents must be paid. These were conditions incident to the defendant's business, and necessarily attending its operations. The plaintiffs were engaged in the

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coal trade, familiar with its details, had dealt in the defendant's coal, and were located at a point both important as a market and convenient for defendant's purpose to supply the Canadian railroads. It was, therefore, natural and legitimate that the defendant should, in promoting its trade, seek for their services, and its president and manager was the officer who, in the ordinary course of affairs, would be expected to act for it in employing them.

The views we have expressed not only rest upon good reason, but they are abundantly supported by authority (*The Merchants' Bank* agt. *The State Bank*, 10 Wallace, 604, 644; *The New Hope and Del. Bridge Co.* agt. *Phoenix Bank*, 3 Coms., 156; *Am. Ins. Co.* agt. *Oakley*, 9 Paige, 496; *Emmett* agt. *Reed*, 4 Seld., 312; *Mumford* agt. *Hawkins*, 5 Den., 355; *Dates* agt. *Keith Iron Co.*, 607 Metc., 224; *The Clarke Nat. Bank* agt. *The Bank of Albion*, 52 Barb., 592; *Farm. and Mech. Bk.* agt. *The Butch. and Drov. Bk.*, 16 N. Y., 125; *S. C.*, 28 id., 425; *Wild* agt. *N. Y. and Austin Silver M. Co.*, 59 id., 644).

But if there be any doubt as to the correctness of our conclusions as to the authority of the defendant's president, yet there is such ample proof of the ratification of the agreement which he assumed to make in defendant's behalf with the plaintiffs as to establish their right of recovery beyond any reasonable doubt. From the correspondence which occurred between defendant's secretary and the plaintiffs, immediately after they were employed as defendant's agents, it is apparent that the defendant had notice of their employment, such notice having been given to the proper officer, its secretary and treasurer.

It is most reasonable and natural to infer that Mr. Mullin, the defendant's president, who employed the plaintiffs, himself gave the notice. In addition to other evidence that the defendant was not slow to recognize their employment and to avail itself of their services, it was proved that not long after the making of the agreement by defendant's president, by

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which plaintiffs were to act as defendant's agents, the defendant made a contract with the Grand Trunk Railway Company of Canada, to furnish and deliver to it 80,000 tons of coal, the contract being made on defendant's behalf by Mr. Mullin, its president and manager, and Mr. Wilson, its secretary and treasurer, the same officers who had acted for defendant in its dealings with the plaintiffs.

And the negotiations for the contract with the railway company being conducted at Montreal, one of the plaintiffs accompanied those officers of the defendant, at their request, to that city to assist them, and did materially assist them in negotiating and securing that contract for the defendant. And it must be borne in mind that one principal purpose of the plaintiffs' employment, indeed, the main one, was to secure their aid to the defendant in obtaining such contracts with the Canadian railways, their commissions being measured by the amount of coal sold. It was also proved that, at the foot of the defendant's contract with the Grand Trunk Railway Company, a note or memorandum was entered referring to the plaintiffs as the defendant's agents at Buffalo, and that, in preparing the written proposition which formed the basis of that contract, and the estimate of the expenses to be incurred in performing it, the defendant set down as one item of those expenses the commission to be paid to the plaintiffs under the agreement made with them by defendant's president. That contract with the Grand Trunk company the defendant performed, delivering under it 80,000 tons of coal, receiving therefor four dollars and eighty-five cents per ton, and, as a part thereof, the very item of ten cents per ton for plaintiffs' commissions, for which this action was brought.

I cannot better express the legal effect of those acts of the defendant than in the words of justice JOHNSON of the supreme court, in *Fister agt. La Rue* (15 Barb., 323): "It is well settled, at least in this country, that where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the

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agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract."

The case of *Sturgis, administrator*, agt. *The New Jersey Steamboat Company* (62 N. Y., 625) is so nearly identical with this as to be an authority directly in point. That action was for commissions alleged to have been agreed upon for the services of Russell Sturgis, as a broker, in chartering two steamers, owned by defendant, to the United States government. It appeared that Daniel Drew, defendant's president, agreed with Sturgis that, if he would effect a charter for the steamers, he should receive five per cent on the earnings; that Sturgis saw the government agent and took him to Drew, and charter-parties were executed, hiring both vessels at \$800 per day for one month, and longer if required; that the vessels, under this charter, remained some months in the service of the government, and the defendant received the charter-money. On these facts, the defendant claimed that Drew had no authority as president to make the agreement with Sturgis, but the court of appeals held that the defendant, by accepting the charter-parties and the moneys under them, not only ratified the acts of Drew in entering into them, but that those acts furnished a presumption that he was authorized to enter into them, and also to use the customary reasonable means for procuring charters for vessels, one of which was the employment of brokers (*See, also, Reuter agt. Electric Tel. Co.*, 6 Ellis & B., 341 [88 E. C. L., 341]).

In this case it is conceded that the contract between the defendant and the Grand Trunk railway was duly and regularly made, and the presumption follows that defendant's

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officers, who made it, were authorized to employ the plaintiffs to assist them to obtain that contract, and to pay them a commission for their services.

The judgment is affirmed, with costs.

NOTE. — Affirmed by court of appeals, November, 1878. No opinion written. [Ed.]

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SUPREME COURT.

JOHN GREEN agt. ROBERT W. MILBANK, CORNELIUS K. GARRISON and others.

Surety and co-surety — liability of one to the other.

Where a creditor, whose claim against the sureties is valid, commenced an action against them upon an undertaking given on appeal from a judgment, and pending the action, one of the sureties paid the judgment to the creditor, at the request of his co-surety, upon his promise to reimburse him one-half the amount:

Held, that the surety who paid the creditor, relying upon such promise, could recover of his co-surety one-half of the judgment, notwithstanding that the law firm of the surety, to whom the promise was made, had procured the judgment to be marked secured on appeal, without notice to the co-surety, the surety himself, at the time he paid the judgment, being ignorant of the irregularity in the order. *Vide Green agt. Milbank* (8 Abb. N. C., 188) where facts are stated.

A surety has the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contributions, as a creditor has in behalf of sureties.

Flemming agt. Waterhouse (40 Superior Court R. [8 J. & S.], 424) distinguished.

A surety who has paid to his co-surety his proportion of the claim of the creditor, which was in judgment, is entitled to be subrogated to the creditors' right to enforce the judgment out of the property of the judgment debtor, upon which it was a lien, and to follow land conveyed away by the judgment debtor, notwithstanding an order marking the judgment secured on appeal, the order being, as to the creditor and the surety, irregular and void.

The effect of a *voluntary* payment made by a surety of a debt barred by the statute of limitations as void for usury or other cause, considered.

Special Term, October, 1878.

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Moses Ely, for plaintiff.

George P. Andrews, for defendant Garrison.

Henry E. Davies, for defendant Mutual Insurance Company.

VAN VORST J.—When this case was, on a previous occasion, brought on for trial, from the evidence then introduced, it appeared to me that a complete determination of the plaintiff's rights, and the equities existing in favor of the defendant Lanier, required the presence of *Cornelius K. Garrison* as a defendant. The reasons for such conclusions were then given (*Vide Green agt. Milbank*, 3 Abb. N. C., 138, 155).

Garrison has been brought in as a defendant, and the case comes on for a further hearing, in pursuance of the order then made; and in his behalf additional evidence has been introduced. Mr. Andrews, the counsel for Mr. Garrison, who now first appears in the case, stated that he did not propose to reargue any of the questions raised, or passed upon, at the former hearing of the action.

But he now urges that a point, which he deems decisive of the case, was not, at the former hearing, raised by counsel, nor considered by the court.

The point suggested is, that as between the plaintiff and the defendant Fullerton, the action of Mr. Fullerton's firm, in procuring the entry of the order "secured on appeal," released plaintiff from all obligation to contribute to Mr. Fullerton, and that the plaintiff, having paid Mr. Fullerton *voluntarily*, and when he was under no legal obligation to do so, and with knowledge of that order, cannot now enforce the Brookman judgments out of the lands conveyed to the defendant, Garrison.

It has been previously decided, in this case, that the plaintiff had neither done nor omitted any act so as to be prejudiced by the order making the judgment "secured on appeal," and that his rights were the same as though the order had not

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been made. This was a right of subrogation to the claims and remedies of the creditor, to enforce the judgment, against all property upon which it was a lien when he became surety, unless the lien was lost through some act or omission of the creditor. It was also decided that the creditor had neither done, nor omitted to do, any thing to discharge his complete remedy against the sureties; that his claim against them was wholly unaffected by the order, making the judgment "secured on appeal."

It appears by the evidence, now introduced, that the creditor commenced an action against Fullerton and the plaintiff, the sureties, to enforce their liability on the undertakings on appeal. It appears by the evidence of judge Reynolds, that both defendants were served with process in that action. His register shows that.

After the commencement of that action Mr. Fullerton had an interview with the plaintiff, in which, as he testifies, it was agreed between them that Mr. Fullerton should pay the full amount and take an assignment of the judgment for the benefit of himself and plaintiff, and that plaintiff would afterwards reimburse him half the sum paid.

Mr. Fullerton accordingly, in June, 1873, paid to the creditor the amount of the judgment and took an assignment of the same, in his own name, and that ended the action of the creditor against the sureties.

In the view I have taken of this case, the creditor having neither done, nor admitted to do, any thing to impair his remedy against them, could have recovered in his action the amount of his judgments against both sureties had the same not been adjusted. And the fact that the same was paid, under the circumstances disclosed by Mr. Fullerton, is an admission on their part of their liability upon the undertaking.

After the payment of the judgments Mr. Fullerton demanded of the plaintiff the payment of the one-half thereof, and he failing to respond Fullerton commenced an action against him for moneys paid out and expended for his use and at his

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request. An answer containing a general denial was interposed to the complaint. But after one or more interviews between the plaintiff, his attorney and Mr. Fullerton the plaintiff finally agreed to pay one-half of the judgments, and on the 30th day of October, 1873, through his attorney, he actually paid the amount and received an assignment of one-half the judgments. It is now urged by the counsel for defendant Garrison that the payment of one-half of the judgments to Fullerton by the plaintiff was a voluntary act, and after knowledge of the defects in the proceeding to have the judgment marked secured, and that, as a consequence, the plaintiff must fail in this action.

When the case was before me on the previous hearing there was nothing to show that the plaintiff had any knowledge of that order, and, hence, in the opinion, it was stated that the plaintiff, "without any knowledge" of the order, paid Mr. Fullerton. It was also stated that if the action of Mr. Fullerton's firm in obtaining the order had had the effect to cancel the lien of the judgments as to the plaintiff, it may be that he could not have maintained an action for contribution against his co-surety; "but as the order did not have that effect his claim for contribution was good."

The facts that the action of Mr. Fullerton's firm had not canceled the lien of the judgment as to the plaintiff, and that he had not been released by the creditor, are important and controlling in this controversy. Under a sense of his legal liability, of which he was satisfied, he agreed that if Fullerton paid the claim he would reimburse him one-half. If the claim had been invalid as to the plaintiff, his agreement to pay one-half could not have been enforced; but the claim in favor of the creditor was good, and so acknowledged. Fullerton, acting upon the plaintiff's admission, in the creditors' action pending against him, and at his request, advanced the money to pay the plaintiff's proportion upon his promise to repay, and that was a good consideration to sustain Fullerton's subsequent suit for moneys paid out and advanced. Although

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the action in favor of Mr. Fullerton was not technically for contribution but upon the plaintiff's promise, yet the promise arose out of a conceded liability to contribute.

But it is urged by the defendants' counsel that although the plaintiff yielded to the claim of Fullerton, he was not legally bound to pay him; that his act was voluntary. I think he was liable; I do not see how he could have avoided answering to his promise upon which Fullerton advanced his proportion of the money.

In support of his proposition the defendants' counsel urges that the law firm of Mr. Fullerton had, by their action, impaired the security which was the plaintiff's indemnity; that the remedy to enforce the judgment was, by the order which that firm had obtained, abridged; that in order to enforce the remedy of the sureties against the property of the defendants, the order must be set aside, which burden impaired the availability of the security.

To sustain this view reference is made to *Fielding agt. Waterhouse* (40 *Supr. Ct. R.*, 424). SEDGWICK, J., who delivered the opinion in that case, carefully considers the duties and obligations of sureties to each other. His reasoning and conclusions are satisfactory.

As is stated by him "a co-surety has, of course, the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contribution, as a creditor has in behalf of sureties" (*American Leading Cases* [5th ed.], vol. 2, p. 400, 452). Judge SEDGWICK enumerates certain acts which, if done by a creditor, would discharge the sureties in whole or in part, or, if done by a surety, would have the same effect as to his co-surety.

If a security be released, or satisfied, or a levy on goods discharged, such acts would be prejudicial to the rights and remedies of the sureties, and would discharge them in whole or in part, according to the extent of the injury.

In that case a judgment had been satisfied of record, for which act the surety, who had taken part in the arrangement,

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was held responsible, and lost his right to compel his co-surety to contribute.

It appeared in that case that the only redress open to the surety, for the act of his co-surety, would be through an action in equity to have the judgment revived, which burden and risk he should not be compelled to bear.

It appeared, however, in the case, as the judge stated, that in such equitable action the surety must fail, as the judgment could not be restored for any purpose.

From that case and others, which are cited by the learned judge, it is here argued that the making of the judgment secured on appeal, having rendered this suit in equity necessary, a burden and vexation, which his co-surety should not have imposed upon the plaintiff, Fullerton could not have obliged the plaintiff to contribute, and for the reason that he did contribute under such circumstances, he cannot enforce the judgments.

This objection amounts to this: The plaintiff, to obtain redress, was obliged to bring this action; he has brought it, and for that reason should fail of success. But an objection of this nature I should say was personal to the surety. In most cases, the surety only obtains satisfaction through trouble, expense and delay.

But I am not prepared to say that the plaintiff, for redress, was shut up to an action in equity. The objection has already been taken in this action, on behalf of another defendant, that the suit was wholly unnecessary, as the plaintiff had a complete remedy at law. That objection was overruled, not, however, for the reason that there was no such remedy, but because this court had jurisdiction, and the objection was not taken in season.

But, in respect to the substance of this objection, it does not appear that Mr. Fullerton took any personal part in obtaining the order, nor that he had any actual knowledge of this order when he paid the judgment and the plaintiff's promise to reimburse him was made. On the other hand, he

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has testified that he had no knowledge on the subject. Personally, therefore, he had done nothing to the injury of his co-surety.

It has been decided in this action that Mr. Fullerton can make no claim against the defendants, Garrison and Lanier, or their property, for the reason that it would be inequitable that he should collect any thing out of their property, because they bought from the judgment debtor, relying on the regularity of the order obtained by Fullerton's law firm; and that, as they had invested their money on the faith of the order, Fullerton was estopped, by the act of his partners, from setting up any claim against them.

But I do not think that, as between him and his co-surety, the plaintiff, whose position has not been injuriously affected by the order, the action of his law firm, of which he was ignorant, could have been successfully interposed by the plaintiff to defeat the action of Fullerton against him for the recovery of half the judgment.

It is urged by the defendants' counsel that there is evidence from which it may be reasonably inferred that, when plaintiff paid Fullerton, he had knowledge of the invalidity of the order, or that the attorney who represented him at that time had such knowledge.

I think the evidence does not justify such conclusion — certainly not as to the plaintiff himself. The plaintiff's attorney, called as a witness for the defendant, has testified that he advised his client that he was legally bound to pay Fullerton's claim. In his opinion he was so bound; that after he had delivered the check to Mr. Fullerton in payment of the plaintiff's share, but in the same interview he learned of the infirmity existing in the order.

But when such knowledge was obtained the claim was already discharged by payment.

It is true that the attorney, after he learned such fact, could have stopped payment of the check if he supposed he would be justified in so doing.

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But I cannot say that he was called upon to take such step and involve his client in an expensive litigation with Fullerton who had asserted his legal claim through an action.

I cannot say that the plaintiff, if chargeable with the knowledge thus acquired by his attorney, was bound at once to recall the check and decide to contest, at his own expense, a suit at law brought by his co-surety.

I do not think he was under any duty to the defendant in the judgment, or those claiming under or through him, to assume such risk and personal responsibility.

His good faith, upon the facts, cannot be questioned. He acted under the advice of counsel and paid under the compulsion of a suit at law pending against him which it was his interest to resist, if he could successfully, but which he believed he could not defeat.

The defendants' counsel refers to cases in which it has been decided that a voluntary payment by a surety of a debt barred by the statute of limitations would not enable the surety to recover of the principal debtor (*Hatchett agt. Pegram*, 21 *Louisiana Ann.*, 722).

And that the payment of a usurious claim, with notice of its true nature, was essentially invalid and gave no right of indemnity (*Whitehead agt. Peck*, 1 *Kelly* [*Georgia*], 141-151; see, also, 1 *Leading Cases in Equity* [4th *Amer. ed.*], pp. 178, 184, 289, 290).

But no such question arises here. The judgments paid by Fullerton were valid claims against the judgment debtor. He cannot escape them from any thing appearing in this action.

And it is such valid claim against this debtor which the plaintiff now seeks to enforce against property held by the debtor, when the judgment was recovered and the liability of the sureties incurred.

This plaintiff has done nothing to prejudice or influence the defendants, who purchased from the judgment debtor, and there is no legal or equitable reason why he should not be indemnified out of this property. The records were open

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to them. They bought voluntarily and for their own advantage. Had they fully investigated before taking title, they would have discovered the invalidity of the order as to the plaintiff.

It appears that they did not discover the irregularity. No blame can be attached to the plaintiff for that, nor, as far as is discoverable, does any blame attach to the defendants' counsel, who, in examining the title, relied upon the clerk's return and information derived from sources upon which he believed he could safely depend.

The plaintiff is in no true sense a volunteer in a matter which he asserts to the defendants' injury. He held out as long as he reasonably and consistently could, and then, under the pressure of a suit, satisfied the demand of his co-surety, and should be allowed to enforce his claim in this action, notwithstanding the order making the judgment "secured on appeal," which, as to him, is adjudged to be invalid.

As to the defendant, the Mutual Life Insurance Company, the complaint is dismissed with costs to them after their answer was interposed.

The plaintiff is entitled to costs against the other defendants. The plaintiff's counsel must prepare the findings of facts and conclusions of law, with a form of judgment for the enforcement of his claim, which will be settled upon notice to the other side.

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SUPREME COURT.

In the Matter of the ATTORNEY-GENERAL agt. THE ATLANTIC MUTUAL LIFE INSURANCE COMPANY.

Life insurance company — insolvency proceedings — when application by company to have its assets taken from receiver and to permit it again to transact business will not be granted — power of special term.

Where the business of an insurance company had been closed and a receiver thereof appointed, pursuant to the provision of chapter 902 of the Laws of 1869, an application was made to the special term by the company to have its assets taken from the receiver and returned to it and to permit it to again transact business:

Held, that the authority of the special term to grant such application is gravely questioned and will not be assumed.

Nor, under such circumstances, will a reference be ordered to report the facts to the court, as a reference had already been had under the statute (the actuary being the officer specially charged with such an investigation), and his report having been made which stands confirmed by both the special and general term,

It seems, that if the order appointing a receiver had been made because a large sum of money had been lost by a robbery, and after such appointment the money was returned, the court, by virtue of its general power in the administration of justice, might, in that or a similar case, interfere. But the reason or cause for such interference must be extraordinary.

The peculiar facts and circumstances connected with the various proceedings in this case fully discussed in the opinion.

Albany Special Term, September, 1878.

APPLICATION by the company to have its assets taken from the receiver and returned to it, and to permit it again to transact business.

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Wm. Barnes, for motion, &c.

Francis Kernan, for sundry policyholders.

George L. Stedman, for other policyholders.

A. Schoonmaker, Jr., attorney-general, for people.

S. Rosendale, for superintendent of insurance.

Henry Smith, for receiver.

WESTBROOK, *J.* — The Atlantic Mutual Life Insurance Company was a corporation doing business under chapter 902 of the Laws of 1869. It has been, in virtue of the provisions of that act, enjoined from doing any new business, and a receiver has also been appointed of its assets, which injunction and receiver order it now seeks to vacate, to the end that it may resume its functions. A history of past events is necessary to the proper understanding and discussion of the questions which this application presents.

On the 8th day of May, 1877, the superintendent of insurance reported to the attorney-general, in pursuance of section 7 of the law referred to, that, in his opinion, the affairs of the company were in such a condition "as to render the issuing of additional policies and annuity bonds by said company injurious to the public interest." In addition to this general statement the superintendent in his report gave the amount of its liabilities and of its assets and made the excess of the former, as to its policyholders, over the latter \$110,385.

Upon this report the attorney-general acted, as he was required by law to do (*section 7 of chapter 902, Laws of 1869*), and on the 11th day of May, 1877, obtained an order for the company to show cause, on the fourteenth day of the same month, why "an order should not be granted that the

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business of said insurance company be closed and a receiver thereof be appointed." It may be proper to state here that the action of the court is also made compulsory by the same section of the statute, and its duty to enjoin its continuance in business and to appoint a receiver is made dependent, not upon the insolvency of the company; but the section expressly provides: "The court shall, thereupon, proceed to hear the allegations and proofs of the respective parties, and in case it shall appear to the satisfaction of the said court that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations as authorized by its charter, then the said court shall issue an order enjoining and restraining said company from the further prosecution of its business, and shall also appoint a receiver of all the assets and credits of said company."

At great personal inconvenience, in order to avoid the delay and costs of a reference, the court itself heard the testimony upon the application of the attorney-general. The evidence showed that \$118,000 of its assets had been deposited with a private banker who was unable to pay it, a sum \$8,000 in excess of its capital stock. There were grave doubts as to some of its investments upon bond and mortgage, and a dividend had been paid in January, 1877, to stockholders, of seven per cent in gold, when, very clearly, none should have been declared. The examination was not so thorough as it would have been if the court had been required to find the company insolvent before it had power to appoint a receiver. It was, however, sufficiently full to enable the court to say, as it did say, that whilst it did not regard the company actually bankrupt, it was clear that, in the then sensitive condition of the public mind, with a sum greater than its capital, either actually lost or then unavailable, with some of its securities questioned and the distrust created by the report of the superintendent of insurance and the action of the attorney-general, the business of the company could not, with a just

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regard to the public interest, be any longer continued unless its stockholders paid into the treasury of the company the sum of \$50,000 in cash. The announcement of this conclusion was favorably received by all parties as an inspection of the stenographer's record of the examination will show. By way of reminder a small part of what then occurred is here inserted: "Mr. Barnes — 'I wish the court would fix some time in which this matter will have to be finished.' The Court — 'Well, what time will suit you?' Mr. Pruyn — 'I can have \$30,000 within twenty-four hours; I don't want time for that purpose, but in order that a meeting of the stockholders may be called.' Mr. Rosendale — 'I hope they will do it as sharp and as promptly as possible.' The Court — 'Can you do it by the last Tuesday in this month?' Mr. Pruyn — 'Easily.' Mr. Rosendale — 'I was in hopes they would do it in far less time; I think a week is a long time.' Mr. Pruyn — 'I shall have to consult the other stockholders; Mr. Alfred Van Santvoord and Mr. Lansing were here yesterday and I had \$25,000 ready, but it will take a few days to see the other stockholders.' The Court — 'Do you say, Mr. Pruyn, that you have no doubt but that this arrangement will be completed?' Mr. Pruyn — 'Not the least, your honor, because I have seen the largest number of the stockholders and they are prepared to do it and desire to do it.' The Court — 'Then the proceedings will now stand adjourned until the last Tuesday of this month, and the suit will then be dismissed provided the claim against the Hope Banking Company be further reduced by the payment of \$50,000 in cash; evidence of that fact to be presented to the court.'"

This conclusion was reached and concurred in early in June. On the last Tuesday of June the proceedings were adjourned to the Ulster special term, at Kingston, held on the 21st day of July, 1877. On the latter-mentioned day, the company appeared, and instead of the amount of capital required being made up, it stated by its counsel, that not a dollar thereof had

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been paid in. It then also appeared with a divided board of direction, a portion of whom desired the appointment of a receiver, and though confessing its inability to comply with the order of the court as to its capital, it asked that it might continue its business, promising to assume no new obligations until by its natural gains its losses should be made up. As there was no power in the court to allow it to continue in a state of semi-life, and as by the destruction of the confidence of its policyholders, they would prefer to allow their policies to lapse rather than to risk the payment of further premiums, the court, both for want of power and in justice to the policyholders, whom it did not propose should suffer for the benefit of stockholders, refused the application, enjoined the company's business, and appointed Edward Newcomb the receiver thereof.

From the order of the special term arresting its business and appointing a receiver, the company appealed to the general term of this court. The appeal brought before that tribunal all the evidence and proceedings of the special term, and was there most carefully and elaborately argued. The action of the special term was fully sustained, and in the opinion then delivered by Mr. justice BOARDMAN, in which his associates, judges LEARNED and BOCKES concur, after reciting the conclusion of the special term, it said: "Such has been the finding and decision in this matter, and we think there is sufficient, *not only to sustain, but to demand such a result.* Indeed, it was substantially conceded by the defendant's officers upon the hearing, and an effort made to supply the necessary amount of assets to enable the company to go on with its business."

Not content with the conclusion of the general term of this court the company appealed to the court of appeals. That court also unanimously affirmed the judgment of the special term. Judge FOLGER, in announcing the conclusion of the court of dernier resort, says: "It is not to be denied that the proof discloses a laxness of administration. The

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trustees were not in the practice of regular or formal meetings, nor, as a body, did they keep up a vigilant, regular or casual supervision of its affairs. A large share of its assets was kept as a cash deposit with a private banker without an agreement from him to pay interest, with no security from him against loss, and he an officer of the company, chiefly instrumental in the conduct of its affairs. Without a regular vote or meeting of the board of trustees, dividends were paid to the stockholders, when, according to the testimony of the secretary, it was impossible to know whether or not the capital of the company was impaired, and when there had, in fact, been losses and depreciation in the value of its assets.

* * * A consideration of the facts and circumstances of this case leads us to the conclusion that the exercise of a sound discretion will not authorize a reversal of the action of the courts below." * * *

It will thus be seen that the action of this court at special term, reluctantly taken, after giving the stockholders of the corporation ample time and opportunity to avoid the result, has been confirmed by all the courts, but the history is not yet complete. In November, 1877, the company, by one Lemon Thomson, who is described in the petition as "one of the trustees thereof," and who in the verification attached thereto swears, "I am duly authorized by a vote of the majority of the stockholders representing a majority of all of the stock of said company to make the foregoing petition, and verify the same on its behalf," asked the district court of the United States for the northern district of New York to administer its assets in bankruptcy. The petition stated among other things, "that said company owes debts exceeding the amount of \$300, *and is unable to pay all of the same in full*. That said company is willing to surrender all its estate and effects for the benefit of its creditors, and desires to obtain the benefit of the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2d, 1867, and the several acts of congress

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amendatory and supplementary thereto." In the verification annexed to the petition Mr. Thomson, in addition to what has been hereinbefore mentioned as therein contained, also declares: "*I do hereby make further oath that the statements contained in said petition are true, according to the best of my knowledge, information and belief.*"

Perhaps, the recital of the past events connected with this company up to this point needs no comment. It may not be a waste of words, however, briefly to state that whilst the corporation was endeavoring to reverse an order which simply declared it to be in an unsafe condition to do business, and whilst by appeals and arguments it was complaining of the injustice of being placed in the hands of a receiver, it was itself, by a proceeding in a federal court, declaring, under oath, that it was actually insolvent, and asking that court to administer and distribute its assets among its creditors through an officer whose functions are identical with those of a receiver, though in that court he is called an assignee.

After the proceedings instituted in the bankrupt court had been dismissed the company sought legislative aid to take its assets from the hands of the receiver, and to restore to its own management the control of its affairs. Upon a full and careful hearing and investigation, the law-making body refused to interfere, and the company was left in the state that the decision of the courts had placed it, under and by virtue of existing laws. From these facts it is apparent that the legislative department of the state government is in full accord with the judicial as to the propriety of past action.

Let us now resume the history of the proceedings in this court. After his appointment as receiver, Mr. Newcomb, with the approval of the superintendent of insurance, and as is required by section 8 of the act of 1869, appointed Mr. Charles R. Knowles, actuary, for the purpose of making "a careful investigation according to the standard fixed by the laws of this state, into the condition of said company, and report thereon in writing, under oath, to said court and receiver."

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The actuary, Mr. Knowles, made a careful, minute and thorough examination of the affairs of said company, and embodied the result in an elaborate report. By that report the company was found to be insolvent, as to its policyholders, to the extent of \$40,564.57, and insolvent as to stockholders to the amount of \$150,564.57.

When this report was presented to this court, on the 11th day of March, 1878, an order was made, as such report was most strenuously objected to as erroneous, sending it back to the actuary "for revision and correction, if he shall find any errors therein, and after such revision and correction of any errors therein, if any exist, that said actuary signify his conclusions by a supplementary report to the court, and thereafter counsel may be heard further upon the case as then presented, upon a notice of three days."

The actuary, pursuant to the order of the court, on full notice to all parties interested, did, after hearing them fully, revise and correct his report, and by a supplemental report, having found an error in the original of \$733, made the deficiency as to policyholders, \$39,831.57, and as to stockholders, \$149,831.57.

On the presentation of this report to the court at special term, it was held that the statute required and contemplated no action by the court. That as the report of the actuary was unfavorable to the solvency of the company, the statute (*sec. 8 of chap. 902 of Laws of 1869*) expressly required the receiver to notify the superintendent of insurance, who with the state treasurer and receiver, was required to convert the assets into money and pay them over to the receiver, who was then to pay creditors as the section directs. The reasons for that conclusion were embodied in an opinion, to which reference is now made.

From the order of the special term requiring the receiver to proceed as the statute directs, an appeal was taken to the general term of this court, and the order of the special term was there affirmed. In the opinion of the general term per

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BOARDMAN, J., after discussing the question of net and gross valuation, it is said: "Whatever rule may have been adopted in calculating these values, *it is evident the condition of the company's affairs is not such as would justify a continuance of its business in any form.* The greatest profit to all concerned consists in the prompt winding up of its affairs, and giving to all creditors their just proportion of its assets."

From the statement which has been given of the past proceedings in regard to this company, it will be seen that the application to return it again to its assets and life is made, after the superintendent of insurance has pronounced it insolvent on a careful examination, after this court, with the confirmation of the general term and of the court of appeals, has pronounced it unsafe to the public interests to allow it to continue its business, after the legislature has refused the relief now sought, after the actuary has found it insolvent, after the explicit declaration of the general term upon the actuary's report and the order of this court thereon, that "it is evident the condition of the company's affairs is not such as would justify a continuance of its business in any form," and after the company itself, acting at the instance of a majority of its shareholders and of its capital, has applied to the federal court in bankruptcy to be wound up as a bankrupt corporation, *its petition to that court being verified by the same individual*, who verifies that to this court, in which latter one it is stated that the company is not only solvent but in an excellent condition to do business. Granting the general power of this court claimed for it by the parties favorable to this motion, would it not be a most extraordinary thing for this court now to reverse all past action and start the company anew? If any extraordinary reason or cause existed, perhaps such a thing might be done. If, for example, as counsel argued upon the motion, the order appointing a receiver had been made because a large sum of money had been lost by a robbery, and after such appointment the money was returned, the court, by virtue of its general power in the

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administration of justice, might, in that, or a similar case, interfere. But when the law has pointed out the mode of ascertaining a corporation's situation as to solvency and that course has been pursued, and the answer is against the solvency, when this court, neither at general or special term, has detected any error in the calculation or conclusion, has this court power, by a new investigation and new inquiry, to again investigate its affairs in regard to the identical matter and things already completely passed upon? If it has, then the command of the statute requiring action, after it has been ascertained and declared insolvent in the mode it prescribes, conveys only idle words, and the legislative mandate is impotent to govern courts. The point now is, not whether the court may not send the report back to the actuary for revision, that power has been once exercised by the special term, and its exercise approved by the general term, nor does it involve the right of the court to act upon new facts occurring after past action, but it is this: Has the special term the power, when the actuary has declared the company insolvent, when his conclusion has been approved by the general term, and when the statute commands action, to go over the same ground the actuary has traveled, and undo and dismiss all past proceedings? The existence of that authority is gravely questioned, and will not be assumed.

It is, however, strenuously urged that a reference should be ordered, to report the facts to the court. We have already seen that a reference has been had under the statute (for the actuary is the officer specially charged with such an investigation), and a report has been made, which stands confirmed by both the special and general term. Grant the power to order the one now asked for, should it be made? That investigation, if directed must continue several weeks, if not months, and must cost several thousand dollars. What evidence is there before the court to justify this expenditure? Only, and solely the oath of Mr. Lemon Thomson, who, while he tells this court, on oath, "that the said company is now in a con-

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dition to meet all of its outstanding liabilities, even upon a net valuation, and also including its outstanding stock as a portion of the said liabilities;" also, on oath as previously stated, told another court less than a year before, that it was "unable to pay all of the same" (its debts), "in full," and that a majority of its stockholders, representing a majority of its stock, desired it to be wound up as an insolvent corporation, according to the provisions of the bankrupt act. This extraordinary change of condition, since the former oath, and since all past action, is accounted for by an alleged error in the actuary's report, which neither the special or general term saw, and by the alleged failure of holders of policies to die. In regard to the latter thought, it may be observed that it is quite likely the death rate among policyholders for a short period has been less than usual, as it, in an equally short period in the future, may be greater. No rate of premiums or calculations of life insurance companies are based upon the mortality of a single year, but upon the average of human life. The gain of one year is overcome by the loss of another, so far as gain or loss depends upon life or death; and it would be most unsafe and unsound in principle to adopt the gain of a single year, caused by unexpected continuances of life, as a basis for pronouncing an insolvent company solvent. As time elapses that gain must be overcome, or the average length of a number of lives, found by experience to be true, is at fault. The court, then, can see no reason upon the testimony before it, either to grant the petition, or to justify it in incurring the large outlay which a reference would involve. The resources of the company should be carefully husbanded, and expended only upon clear evidence requiring it, and that has not been given.

There is also one other thought which has great weight with me in reaching the conclusion to deny this application. This motion is in the interest of stockholders only and not of policyholders. If the corporation is restored to its functions, the premiums which are past due must be paid up, and poli-

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cies continued in life by the payment of those to accrue. What policyholder will feel safe in so doing? Will not all suffer them to lapse, and will not the court, in granting this motion, only wipe out debts without payment, and give back to debtors assets which ought to liquidate obligations incurred? It is true a time in the future could be fixed for policyholders to pay premiums in arrear, but how few would be able to make the payments, and how few, with confidence destroyed, willing. It would indeed be a capital money-making arrangement for stockholders, but to policyholders what? The situation can only be explained by strong language. It would be life to the former, but death to the latter. From the responsibility of such action this court must be excused.

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N. Y. SUPERIOR COURT.

THE BANK FOR SAVINGS IN THE CITY OF NEW YORK agt.
MARTIN FRANK and others.

MARTIN FRANK agt. THE BANK FOR SAVINGS and others.

Mortgages — agreement by first mortgagor to waive priority of — Latent equities — Recording acts — Purchaser in good faith.

On October 13, 1869, the bank agreed to loan one E. \$7,000. There then existed on the property a first mortgage for \$7,200, on which \$5,700 of the principal was due, made by B. to H., dated November 16, 1864, and duly recorded; also a mortgage made by D. and R. to W., dated March 31, 1868, and recorded, to secure the payment of \$6,700 installments. On closing title the bank paid \$5,827.62 to pay amount due on first mortgage. W., the admitted owner of the second mortgage, executed an agreement postponing it to the mortgage to the bank, which agreement was recorded November 22, 1869, in liber of conveyances. Upon the faith of this agreement the bank's mortgage was taken and duly recorded November 23, 1869. Nothing further was heard of the matter until W. demanded from D. and R., the makers of his mortgage, made subsequent to that of the bank, payment of the same, and threatened foreclosure when D. and R. agreed to buy for the purpose of foreclosing it themselves. They were advised to take the assignment in the name of a third party and induced F., who is a step-brother of R., to purchase it for a consideration of \$1,000, to be paid by two notes. D. and R. knew of W.'s agreement with the bank, though they had never consented to or ratified it, and they assured F. that the mortgage was all right and a first mortgage. Before F. accepted the assignment and gave his notes he retained Wagner, who had been, and then was, the attorney for D. and R., to search the title for him, and in such search he found the agreement on record as above stated. At about 12 o'clock at noon, on April 23, 1878, at which time the relation of attorney and client existed between F. and Wagner, the latter had an interview with the attorney for the bank, during which the agreement between

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W. and the bank and certain errors in the recording thereof were discussed. F. took the assignment and parted with the consideration therefor, subsequent to said interview, and put it on record at 3.45 P. M., on that day:

- Held*, 1. That the agreement between the bank and W., the assignor of F., that W. should waive the priority of his mortgage in favor of a mortgage to be given by E. to the bank, is one not entitled to be recorded under the statute, and, hence, the record thereof is not constructive notice to anybody.
2. That even if it had been thus entitled it should have been recorded in the book of mortgages and not in the book of conveyances in order to make the record effectual, as against subsequent *bona fide* assignees or purchasers, from the mortgagee.
 3. That in no aspect of the case can the bank derive any benefit from the mere recording of said written instrument against F., as subsequent assignee of W., whose assignment was duly recorded, provided F. was a purchaser in good faith and for a valuable consideration.
 4. That an assignee of a mortgage must take it subject to the equities attending the original transaction, and the true test is to inquire what the mortgagee can do by way of enforcement of it against the property mortgaged. What he can do the assignee can do and no more.
 5. That where a mortgage had a valid inception as a subsisting and enforceable lien in the hands of the mortgagee to the full extent of its face, equities arising thereafter stand upon a different footing and are to be disposed of upon such other principles of public policy, or, according to such statutory requirements, as the facts of the particular case may call for.
 6. That the courts have always been discriminating and careful in cases of conflicting equities arising after the inception and during the life of a mortgage to cast the loss, if any, upon the party at fault. But the protection of the statute extends only to purchasers in good faith and for a valuable consideration. Good faith is not enough without a valuable consideration parted with on the faith of the conveyance; nor is the parting with such valuable consideration sufficient, in the absence of good faith, which cannot be said to exist in case of notice.
 7. That though F. may have been personally ignorant of the true state of affairs, the knowledge which his attorney had before the final close of the transaction was, in law, equivalent to notice to him; and he having purchased with notice of the rights of the bank, he cannot be held to have been a purchaser in good faith, though he may have parted with a valuable consideration.
 8. That the bank is entitled to a finding setting forth this fact; to an adjudication that it has a lien upon the mortgaged premises for the whole amount of E.'s mortgage, superior to the lien of F., by virtue of

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his said mortgage and to the usual decree of foreclosure to carry this adjudication into effect.

9. That R. and D., as original mortgagors by the agreement between W. and the bank, it having been made without their knowledge or consent and remaining unsatisfied by them, are discharged from all personal liabilities in the premises.

Special Term, December, 1878.

Chas. E. Strong and John L. Cadwalder, for plaintiff.

Arnold H. Wagner, for defendant.

FREEDMAN, J.—These two actions which were tried together, were commenced to foreclose mortgages on the same property, and the question between the Bank for Savings and Martin Frank, as the holders of the mortgages, is which of the said mortgages shall have priority.

There can be no doubt that the real agreement between the bank and Wolff, the assignor of Frank, was that Wolff should waive the priority of his mortgage upon the premises in question in favor of a mortgage to be given by Eppensteiner to the bank upon the same premises to secure the payment of the sum of \$7,000.

To carry such agreement into effect, Wolff, on November 15, 1869, for a valuable consideration, executed under his hand and seal, and delivered to the bank, an instrument in writing purporting to contain such waiver, which was recorded November 22, 1869, in Liber 1113 of Conveyances, page 625.

Upon the faith of said agreement and instrument, the bank advanced to Eppensteiner the said sum of \$7,000, and out of that amount the sum of \$5,827.62 was used in paying off and discharging a mortgage upon the same premises held by Philip C. Harmon and others, which was prior in point of date and record to Wolff's mortgage.

As the real agreement, for the purposes of these actions, must be deemed to have become merged in the written one, it is important to consider what rights the bank acquired under

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and by virtue of this written instrument, and the recording thereof, as against a subsequent assignee of Wolff's mortgage, whose assignment was duly recorded.

In terms and effect it was a mere personal contract between two holders of mortgages, for the postponement of one mortgage to the other. No interest in the mortgaged premises, nor any right, title or interest in or to the prior bond and mortgage, was transferred thereby. It did not operate as a release, for the whole premises continued subject to Wolff's mortgage.

It was, in substance, a stipulation as to the law of the case, not as regards any thing entering into or affecting the debt or the security, for both the debt and the lien of the mortgage were to remain, but in relation to priority simply.

Such an agreement was held to be one that is not entitled to be recorded under the statute, and hence, the record thereof is not constructive notice to anybody (*Gillig agt. Maass*, 28 N. Y., 191).

But if it had been thus entitled, it should have been recorded in the book of mortgages, and not in the book of conveyances, in order to make the record effectual as against subsequent *bona fide* assignees or purchasers from the mortgagee, for the statute (1 R. S., 756, sec. 2) directs that different sets of books shall be provided for the recording of deeds and mortgages, in one of which sets all conveyances absolute in their terms, and not intended as mortgages, or as securities in the nature of mortgages, shall be recorded; and in the other set such mortgages and securities shall be recorded.

Moreover, the mortgage, whose priority Wolff had agreed to waive, was a mortgage recorded on the 1st day of April, 1868, in Liber 852 of Mortgages, page 258; but this mortgage he described in the written instrument as a mortgage recorded on the 16th day of April, 1868, in Liber 1049 of Mortgages, page 261.

In no aspect of the case, therefore, can the bank derive any benefit from the mere recording of the said written instru-

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ment as against Martin Frank, as subsequent assignee of Wolff, whose assignment was duly recorded, provided Frank was a purchaser in good faith, and for a valuable consideration.

It is insisted, however, that Martin Frank could only buy what Wolff had to sell, and that he stands in the latter's shoes.

The general rule undoubtedly is, that a seller or assignor of chattels or choses in action can give no other or better title than he himself has, and that the purchaser or assignee must be content to stand in his place and to accept his title; and that consequently one who takes an assignment of a bond and mortgage, as *Mrs. Burchard* did in *Schafer* agt. *Reilly* (50 *N. Y.*, 61), takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons and strangers.

In the case last referred to, whatever vitality the mortgage had, was by reason of the purchase of it by, and the assignment to, *Mrs. Burchard*. It took effect only as a mortgage by its delivery to her, and, hence, it was held that she took it subject to Griffin's mechanic's lien, which had been perfected pursuant to the statute prior to that time.

In the *Trustees of Union College* agt. *Wheeler* (61 *N. Y.*, 88), which was a case of inherent equity as between a purchaser, having under a certain contract, an interest in the equity of redemption, and the mortgage, it was held upon such inherent equity, that the mortgage never was any other than a lien subordinate to the rights of the purchaser, and that for this reason the plaintiff, as assignee of the mortgage, acquired no other or greater rights. The true test, said DWIGHT, C. is to inquire what the mortgagee can do by way of enforcement of it against the property mortgaged. What he can do, the assignee can do, and no more.

In *Greene* agt. *Warnick* (64 *N. Y.*, 220) it was held that where two mortgages are executed at the same time, and upon an agreement that they shall be and remain equal liens in all respects upon the premises, an assignee of either of them takes it subject to all the equities arising out of the agree-

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ment in favor of the holder of the other, and that in such a case prior record is of no avail, because neither mortgage is a *subsequent* conveyance within the meaning of the recording act. In reaching this conclusion and commenting upon the authorities, the test laid down by DWIGHT, C., in the case of *The Trustees of Union College agt. Wheeler (supra)*, is specifically referred to.

In *Crane agt. Turner* (67 N. Y., 437) Pierce had executed a mortgage upon premises of which he had possession under a contract of sale, and, after receipt of a deed, he conveyed the premises and received from the grantee who had notice of the prior mortgage, a mortgage for a part of the purchase-money. Pierce then assigned his mortgage to the defendant Turner, assuring him that the mortgage was the first lien. In an action to foreclose the first mortgage, Turner claimed that his mortgage was entitled to priority. Both mortgages having been duly recorded, it was held upon the authority of the preceding two cases above referred to (1), that as Pierce would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right and was also estopped; and (2), that the recording act did not aid the defendant.

The principle, therefore, as was said by MILLER, J., in delivering the unanimous opinion of the court of appeals in the case last cited, is settled beyond peradventure, that an assignee of a mortgage must take it subject to the equities attending the original transaction, and the true test is, as stated by DWIGHT, C., in *The Trustees of Union College agt. Wheeler (supra)*. Such equities may exist in favor of the mortgagor or in favor of third persons.

But this general rule does not extend to equities other than such as attend the original transaction. They must exist at the time of the inception of the mortgage, at the time it springs into life. In all such cases the assignee takes subject to them, and he cannot defeat them simply by showing that he is a *bona fide* purchaser for a valuable consideration. In

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all such cases it is immaterial that he had no notice of their existence at the time of the assignment.

But where a mortgage had a valid inception as a subsisting and enforceable lien in the hands of the mortgagee to the full extent of its face, equities arising thereafter stand upon a different footing, and they are to be disposed of upon such other principles of public policy, or according to such statutory requirements, as the facts of the particular case may call for.

The cases which are most familiar as falling within this class, are cases presenting conflicting claims under different successive assignments of the same mortgage by the mortgagee. They were usually determined according to the legal maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act or culpable negligence enabled the commission of the fraud. Even the decisions of such as were determined upon the provisions of the statute relating to the proof and recording of conveyances of real estate, and the canceling of mortgages, rest to a large, but sometimes not apparent, extent upon this maxim, for the very first section of that statute is but a reiteration in the form of a legislative enactment of the great principle underlying the maxim.

The statute provides, that every conveyance of real estate shall be recorded as prescribed by it; and that every conveyance not so recorded, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded (*Sec. 1*).

The term "conveyance," as thus used, embraces every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and testaments, leases for a term not exceeding three years and executory contracts for the sale or purchase of lands (*Sec. 38*).

And the term "purchaser," as thus used, embraces every

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person to whom any estate, or interest in real estate, shall be conveyed for a valuable consideration, and, also, every assignee of a mortgage or lease, or other conditional estate (*Sec. 37*).

This statute applies only to successive purchasers from the same seller, and the record of the assignment of a mortgage is constructive notice only of such assignment, as against subsequent assignees of the mortgagee (*Gillig agt. Maass*, 28 *N. Y.*, 191; *Purdy agt. Huntington*, 42 *id.*, 334, 338, 347).

That an assignment of a mortgage is a conveyance within the meaning of the statute, and that, in order to protect himself against a subsequent *bona fide* purchaser of the mortgage, whose assignment may be first recorded, the first assignee, since the Revised Statutes of 1830, must record his assignment has been held in *Vanderkemp agt. Shelton* (11 *Paige*, 28), and *Campbell agt. Vedder* (3 *Keyes*, 174).

Although, therefore, as to the mere holder of a subsequent mortgage, the record of a prior mortgage is sufficient notice of its existence and of the rights of the assignee thereof, though the assignment of the prior mortgage be not recorded, and although such non-recording does not affect the rights of the holder thereof against subsequent purchasers of the premises, who are bound by the previously recorded mortgage, no matter who holds it, yet, as against a subsequent purchaser in good faith and for a valuable consideration from the mortgagee, whose assignment is first recorded, such holder's rights are postponed, because by omitting to record his assignment he failed to give what, under the statute, would have constituted constructive notice of his rights to all subsequent assignees of the mortgage.

So, it was held, that where a party takes a mortgage with notice of a prior unrecorded mortgage, and with the understanding that he is to take his mortgage subject to the previous one, he cannot claim priority; but that his *bona fide* assignee, without notice of the prior unrecorded mortgage, is not affected by the notice to his assignor, but that such *bona fide* assignee is as much protected as if no notice had ever existed

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(*Jackson ex dem. Hyer and others agt. Van Valkenburgh*, 8 Cow., 260).

This doctrine was recognized in *Fort agt. Burch* (5 Denio, 187) with the qualification only that the assignment must be recorded before the prior mortgage is recorded; and with this qualification it has remained good law ever since.

In *Gillig agt. Maass* (28 N. Y., 191) it appeared that at the time the agreement was made between Walber, the original mortgagee, and Jones, as a junior mortgagee, whereby Walber undertook to waive priority in favor of Jones, Walber was no longer the owner of the mortgage, or that he had any interest therein, he having assigned the same to a *bona fide* purchaser. As he had no title whatever left, nor any apparent right to act for such *bona fide* purchaser, and the latter having done nothing to mislead Jones, it was held that, although the assignment was not at that time recorded, Jones treated with Walber at his peril.

The foregoing review of authorities sufficiently shows how discriminating and careful the courts have been in cases of conflicting equities arising after the inception and during the life of a mortgage, to cast the loss, if any, upon the party at fault.

On the other hand the protection of the statute extends only to purchasers in good faith and for a valuable consideration. Good faith is not enough without a valuable consideration parted with on the faith of the conveyance (*De Lancy agt. Stearns*, 66 N. Y., 157), nor is the parting with such valuable consideration sufficient in the absence of good faith, which cannot be said to exist in case of notice.

The law being as stated, and it having already been shown, that the bank can derive no benefit from the mere recording of the written agreement as against Martin Frank as subsequent assignee of Wolff, whose assignment was duly recorded, the question remains to be considered whether Frank was a purchaser in good faith and for a valuable consideration, and,

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if he was, upon whom, in view of all the facts of the case, the loss, which may arise, shall be cast.

At the time of the execution of the agreement between Wolff and the bank, Wolff was the true and lawful and undisputed holder of the mortgage, which he subsequently assigned to Frank, and as such he had full power to dispose of it or any specific portion of it. But no such disposition was made in favor of the bank. He parted with no part of his title. In terms, and legal effect, as already shown, the agreement was a mere personal contract collateral to, but not entering into the mortgage, or mortgage debt, or affecting the mortgaged premises or any part thereof.

Consequently, if it were necessary to determine with precision, whether this contract, which stands unrecorded in law, ran with the mortgage in such a way that Wolff could not subsequently assign, even to a *bona fide* purchaser for full value, more than his own rights, or whether such a purchaser could, by assignment, acquire title to the mortgage free and clear of the personal stipulation, such determination, in view of all the facts of this case, might be attended with difficulty, and a decision either way might, perhaps, be confronted with some apparent authority to the contrary and meet with some logical difficulties, especially as Wolff appears to have been just as innocent of intentional fraud or wrong-doing as Frank and the bank were.

But such determination is unnecessary, if Frank did not purchase in good faith and for a valuable consideration within the meaning of the law. Upon this branch of the case it seems to me that I am compelled to hold that he was not a purchaser in good faith.

Wolff had demanded from Dilger and Raichle, the makers of the mortgage, payment of the mortgage and had threatened foreclosure, when they agreed to buy it for the purpose of foreclosing it themselves. They were advised to take the assignment in the name of a third party, and they finally induced Frank, who is a step-brother of Raichle, to purchase

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it for a consideration of \$1,000 to be paid by two notes, payable within six and twelve months respectively. At that time the sum remaining due thereon amounted to \$1,824.61. They knew of Wolff's agreement with the bank, though they had never consented to or ratified it, and they assured Frank, as the latter swears, that the mortgage he was about to buy, was all right and a first mortgage. Now, Frank swears that before he accepted the assignment and gave his notes he retained A. H. Wagner, who had been, and for all that appears then was the attorney and counsel of Dilger and Raichle, to search the title for him, and by the testimony of Strong, it is established that Wagner did search the title, and found the agreement on record as above stated, although whether he searched for Dilger and Raichle, or Frank, is not quite clear. But at all events it sufficiently appears that at about 12 o'clock at noon, on the 23d of April, 1878, at which time Frank concedes the relation of attorney and client existed between himself and Wagner, the latter had an interview with Strong, the attorney of the bank, during which the agreement between Wolff and the bank, and the errors in the recording thereof, were discussed between them, and that Frank took his assignment, and parted with the consideration therefor, subsequent to said interview and put it on record at 3.45 p. m., on that day. Wolff and Frank had not met before that day, and no communication of any importance ever passed between them either before or at the close of the transaction resulting in the assignment. So far there is no conflict in the testimony nor any room for doubt, for Wagner was not called as a witness to contradict either Strong or Frank. On the contrary it was admitted, for the purposes of the trial, that Strong's testimony is true. Frank, therefore, through his attorney, must have had knowledge of the true state of affairs, unless he was a mere dummy for Dilger and Raichle, and as such had agreed not to know any thing. He swears, however, that he purchased the bond and mortgage in question for his own account, and that at the time of such purchase and the acceptance of the assignment,

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he was ignorant of the existence of any agreement whereby Wolff had consented to waive the priority of that mortgage.

That may have been so; and there being nothing in the case which compels me to disbelieve him upon this point, I shall assume that it was so, but in view of the other uncontroverted facts it is not enough. Though he may have been personally ignorant all the cases agree that the knowledge which his attorney had before the final close of the transaction, as above stated, was in law equivalent to notice to him (*Bank of the U. S. agt. Davis, 2 Hill, 451; Ingalls agt. Morgan, 10 N. Y., 178 [pp. 184, 185]; Dillon agt. Anderson, 43 id., 231 [p. 238]; The Distilled Spirits, 11 Wall., 356*).

Having, therefore, purchased with notice of the rights of the bank he cannot be held to have been a purchaser in good faith, though he may have parted with a valuable consideration.

The bank is, therefore, entitled to a finding setting forth this fact; to an adjudication that it has a lien upon the mortgaged premises for the whole of the principal sum of \$7,000 and the interest thereon from August 15, 1877, superior to the lien of Martin Frank by virtue of his said mortgage, and to the usual decree of foreclosure to carry this adjudication into effect.

The only remaining question relates to the liability of Raichle and Dilger, as original mortgagers, for a possible deficiency under the mortgage held by Frank. That mortgage was executed by them to Julius T. Wolff, March 31, 1868.

Subsequently, namely, by deed dated April 14, 1868, they conveyed the mortgaged premises to Charles A. Buddensick, who, by deed dated March 1, 1869, conveyed them to Frederick Eppensteiner. Both Buddensick and Eppensteiner took title, subject to Wolff's mortgage, and assumed the payment thereof. In equity, thereof, Raichle and Dilger became sureties for the payment of such mortgage from the time of their conveyance to Buddensick, and any subsequent agreement between the holder of the mortgage and the owner of the equity of redemp-

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tion, or the holder of any other mortgage, altering the manner of the payment of the first-named mortgage or lessening the security afforded by the mortgaged premises for the payment of such mortgage, which was made without their consent, or remains unratified by them, releases them from the obligations of such suretyship (*Caloo agt. Davies*, 8 *Hun*, 222 [*affirmed by the court of appeals*]).

That the agreement between Wolff and the bank was an agreement of this character is not disputed. It was made upon a sufficient and valid consideration, and its effect was to materially lessen the security afforded by the mortgaged premises and, consequently, to increase the responsibility of the mortgagors. And having been made, as the evidence shows, without the knowledge or consent of such mortgagors and remaining unratified by them, it discharges them from all personal liability in the premises. No judgment for deficiency can, therefore, be given against them in favor of Frank.

The attorneys for the respective parties should prepare and submit findings in accordance with this opinion.

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COURT OF APPEALS.

In the Matter of the Petition of GEORGE H. BURMEISTER to vacate an assessment for regulating, &c., Forty-sixth street, between Eleventh avenue and Hudson river, in the city of New York.

Assessments in New York — vacation of — Paving and repaving — as used in chapter 580 of 1872, and chapter 313 of 1874 — No distinction between sidewalk and carriageway — Commissioners' certificate.

Under the provisions of chapter 137 and 383 of the Laws of 1870, a resolution passed by the common council authorizing a specific improvement, which was passed without a three days' prior publication, as required by section 20 of chapter 137, is illegal and an assessment founded thereon void; and the fact that the mayor and comptroller failed to designate papers in which the city advertising should be done, as they were required to do by section 1, chapter 383 of such laws, and in consequence there was no paper in which the advertising could legally be done, does not excuse a non-compliance with section 20 of chapter 137, or make such resolution and assessment valid.

The object of requiring publication is to give notice to tax-payers of proceedings which may affect their interests. It is a substantial requirement, and the statute is prohibitory. If there are no corporation papers the common council cannot act or take the first step.

The certificate of the commissioners under the act chapter 580, laws of 1872, has no effect upon the rights of *parties* to vacate assessments under the exception contained in the seventh section of that act. These provisions relate to the validity of the contracts and bind those, and those *only*, who were parties to the contracts and to the proceedings. They affect the city and the contractors and *no one else*.

The words "paving" and "repaving," as employed in the acts of 1872 and 1874, include the sidewalks, the crosswalks, the curb and gutter stones and the carriageway. The work of setting curb and gutter stones and flagging the sidewalk which, in this case, had once been done and paid for, was a repavement of the street within the meaning of the exception contained in the seventh section of the act of 1872.

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A *street* includes sidewalks and gutters, and when the legislature used this general term in the act of 1872 they intended to embrace the *whole street and every kind of paving*.

February, 1879.

ON or about the 1st day of May, 1875, the petitioner, George H. Burmeister, served his petition herein on the corporation counsel. Proofs were taken of the various facts alleged in the petition.

It was shown by the proofs that an assessment for regulating, curb, gutter and flagging Forty-sixth street, between Eleventh avenue and Hudson river, in the city of New York, was imposed on lots ward numbers 16 and 29, in block 227; that said assessment was confirmed on the 19th day of December, 1872, and that at that time the petitioner was, and still is, the owner of said lots.

That the work for which the assessment was imposed on said lots was solely for flagging, curbing and guttering in front of said lots.

That said lots had, prior to the assessment in question, by an assessment confirmed on the 7th day of February, 1865, been assessed for flagging, curbing and guttering, and that such prior assessment had been paid.

That the resolutions and ordinances authorizing the assessment sought to be vacated were introduced in the board of aldermen on the 10th day of October, 1870, and adopted on the 17th day of October, 1870; introduced in the board of assistant aldermen on the 24th day of October, 1870, and adopted on the 10th day of November, 1870.

That, under section 1, chapter 853, Laws of 1868, no papers were designated as corporation papers in which the proceedings of the common council, or of either branch thereof, should be published, except by a designation of December 1, 1868, whereby the Democrat (daily), Citizen, Leader, Atlas (weeklies) were designated as corporation papers.

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That said designation was never communicated to the common council, or to either branch thereof.

That no designations were made under the Laws of 1870 (*chap.* 137), or under any subsequent laws, until after the passage of the resolution in question.

That the resolutions were not published as required in any of the papers designated under the designation of December 1, 1868.

On this state of facts the motion to vacate the assessment was argued before Mr. justice DONOHUE on the 17th day of August, 1876, and an order made that day vacating that assessment.

From this order an appeal was taken. The appeal having been heard at the general term a rehearing was ordered. No decision on the merits of the question was made (*See opinion of DAVIS, P. J., 9 Hun, 613*). The rehearing was had before Mr. justice LAWRENCE, who, on such rehearing, made an order vacating the assessment and writing the following opinion :

LAWRENCE, J. — I do not appreciate the distinction which is sought to be drawn between the words "flagging" and "paving;" and, notwithstanding the additional testimony taken since this case was sent back by the general term for further proofs, I adhere to the view long entertained by me that the words "paving" and "repaving," as employed in the acts of 1872 and 1874, include the sidewalks, the crosswalks, the curb and gutter stones and the carriageway. I can discover nothing in those acts which indicates an intention on the part of the legislature to restrict those terms to the covering of the carriageway. The remarks of Mr. justice ALLEN, in the case of the *Matter of Phillips* (60 N. Y., 22 and 23), leave no room for doubt in my mind upon this point (*See, also, Matter of Burke, 62 N. Y., 224*). The general term did not decide this point when this case was last before them, and I am, therefore, at liberty to pass upon the question as if it were before this court for the first time, and also to follow the decisions made by the court of appeals in other cases.

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The statutes of 1872 and 1874 should, in my opinion, be liberally and not narrowly construed, being remedial as to the property owner. It appears from the evidence that the work for which this assessment was laid was completed before the act of 1872 was passed. The petitioner is, therefore, entitled to avail himself of the exception contained in the seventh section of that act (*see opinion of the court of appeals on the motion for a reargument in Peugnet's case*); and this, notwithstanding the certificate of the contract commissioners, if the proofs show that the ordinances and resolutions were not advertised as required by law in the official newspaper. If I am correct in the position that this is a case of repaving, this objection is fatal to the validity of the assessment.

Assessment vacated.

From such order an appeal was taken again to the general term which resulted in a reversal of the order (*See opinion of BRADY, J.*, 12 *Hun*, 478).

From such order this appeal is taken.

P. A. Hargous, for petitioner. This assessment is for a repavement and is within the exception of section 7, chapter 586, Laws of 1872, and chapter 313, Laws of 1874; *Re Phillips* (60 *N. Y.*, 16); *Re Burke* (62 *id.*, 224); *Re Keteltas id.*, 624); *Re Astor* (53 *id.*, 617). This assessment was unauthorized by any ordinance and, therefore, void (*Matter of Second Ave. Meth. Epis. Ch., court of appeals, MS., not yet reported; Matter of Cram, id.; Matter of Welch, BARRETT, J., MS.*). The ordinance and resolutions authorizing this improvement were not published as required by the charter of 1870 and by law (*Laws of 1870, chap. 137, sec. 20; Matter of Douglass*, 46 *N. Y.*, 42; *Re Smith*, 52 *id.*, 524; *Re Dickel, court of appeals affirming, INGRAHAM, J., not reported; Re Folsom*, 56 *N. Y.*, 60; *Re Levy*, 4 *Hun*, 501; *Matter of Menzies, BARRETT, J., MS.; and see opinion, LAWRENCE, J., in this case*). The certificate of the commissioners

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appointed under chapter 580, Laws of 1872, did not validate the assessment (*Re Astor*, 53 *N. Y.*, 617; *Re Anderson*, 60 *id.*, 457; *Re Phillips*, 60 *id.*, 16; *Re Mayer*, 50 *id.*, 504).

Wm. C. Whitney, counsel to the corporation, and *J. A. Beal*, of counsel, argued, I. That as the assessment was laid for "setting curb and gutter stones and flagging" and not for "paving," it could not be vacated for an omission to publish the resolution and ordinance of the common council, citing chapter 580, Laws of 1872, section 7; chapter 313, Laws of 1874; Revised Ordinance, 1838 and 1839; section 2 of chapter 14, Revised Ordinances of 1866, page 227). II. There is no proof that the proceedings of the common council authorizing the work for which the assessment was laid were not published as required by law. The burden of proof to establish the alleged error was upon the petitioner (*Re Bassford*, 50 *N. Y.*, 509), and publication three days before the final passage of the ordinance was sufficient (*Re Conway*, 62 *N. Y.*, 504).

CHURCH, *Ch. J.*—The ordinance authorizing the work was adopted by the board of aldermen October seventeen, and by the board of assistant aldermen November ten, and approved by the mayor November 15, 1870.

The petitioner claims the benefit of the exception contained in the seventh section of chapter 580, of the Laws of 1872, upon the ground that the work was a repavement of the street which had once been done and paid for, and rests the motion to vacate principally upon the ground of a failure to publish the ordinances as required by law.

The right of the petitioner to the benefit of the exception, is denied, and also that any irregularity occurred in advertising. The question of irregularity will be first considered. I have examined the statutes, and all the decisions bearing upon the subject and find some difficulty in reconciling the decisions both in the supreme court and this court, but the

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apparent conflict in some of them arises from a difference in the facts and points presented, rather than from a difference of opinion as to the law. The statutes in force at the time this work was authorized, were contained in chapter 137 and 383 of the Laws of 1870. By section 20 of the former act it was made the duty of the clerks of the respective boards to publish all resolutions and ordinances of the common council, and prohibited any vote to be taken in either board upon the passage of a resolution or any ordinance which contemplated a specific improvement, or the levying any tax or assessment until after the same should have been published three days, and also required that such resolution or ordinance should, after its passage by each board, be published with the ayes and nays thereon. As this section does not specify, the question occurs how and when the publication was to be made. This question is answered by section 1, chapter 383, which declares that "all advertising for the city government hereafter, including the legislative and executive departments, and in street and assessment proceedings, shall be published in not more than seven daily and six weekly newspapers, printed and published in said city, to be designated from time to time by the mayor and comptroller of said city," and prohibited any payment for such advertising to any other paper than those designated.

It appears now that at this time, there had been no designation of papers under this act and that no selection was in fact made until during the year 1871. It is suggested, and I infer that this was the view taken by the learned judge who delivered the opinion, at the general term, that in the event of no designation of papers the clerk might publish the proceedings in any paper. I am unable to concur in this view. The two statutes should be read together. In effect they require the clerk to publish the proceedings in the papers to be designated, and all action of the common council is prohibited until such publication. The clerk has no discretion to exercise and no authority to publish in any other than the desig-

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nated papers. Such a discretion has never been vested in the clerk or any other officer of the city, and such a power would destroy the protection which a publication was designed to secure. It would enable the clerk to insert the proceedings in any obscure sheet in the city. The object of requiring publication is to give notice to tax-payers of proceedings which may affect their interests. It is a substantial requirement and should not be frittered away. If papers are designated by some officer or body, the citizen knows where to look for these proceedings, but if it is left to the discretion of some subordinate all the beneficial purposes of publication might be defeated, and it would be as well to say, that if no designations were made, no publication need be made. This court held *In re Smith* (56 N. Y., 526) that if there were no corporation papers, no proceedings could be instituted, and that the publication according to the statute was a condition precedent to any right of the common council to act. The same decision was made *In re Levy* (63 N. Y., 637) in which this court adopted the opinion of BRADY J., reported in 4 Hun 501. These decisions are authoritative that if there are no corporation papers the common council cannot act. The statute is prohibitory. *In re Folsom* (56 N. Y., 60) this court held, from the facts appearing in that case, that certain designations made under the act of 1868 might continue as official papers until designations should be made under the act of 1870, and that by not changing such designations the officers, which were the same in the act of 1870 as in the act of 1868, acquiesced in the designation of such papers, and a publication therein was good. *In re Anderson* (60 N. Y., 457) the question was, whether the New York Leader was a corporation paper. It had been designated in 1867 but that selection was limited to that year and it was held that as it did not appear that the designation under the act of 1868 had been communicated to the common council as required by that act, no legal employment or selection for 1868, of that paper, had been made, and hence proof of a failure to publish in that

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paper did not invalidate the proceedings. These decisions are not in conflict, but were made upon the facts appearing in each case. The doctrine in the two cases before cited, of *Smith* and *Levy*, that in the absence of corporation papers the common council has no authority to pass an ordinance for a local improvement, or to lay an assessment, has not been denied, or its soundness questioned. *In re Folsom* it was not disputed that papers had been duly selected in 1868, and it was held that they continued by adoption as corporation papers until a new selection was made under the act of 1870. In this case the evidence tended to show, and without explanation was sufficient to establish, that no legal designation of papers was made under the act of 1868, because, upon authority of *Anderson case (supra)*, such designation was not communicated to the common council nor was any evidence produced which would obviate the force of that requirement in that act, or from which an inference could be drawn, that it had been complied with. We cannot go back of 1868 because the selections in 1867 were limited to one year (*In re Burke* 62 N. Y., 224).

As the case stands we must assume, that at the time this ordinance was passed, there were no papers designated, either according to the act of 1870 or 1868, in which these proceedings could have been published, and this being so, the common council were expressly prohibited from passing the ordinance in question. We feel bound to adhere to the previous decisions of this court upon this point, and we entertain no doubt of their correctness.

It is insisted, however, that the contract for this work was validated, and the alleged irregularities cured by the certificate of the commissioners under the act chapter 580, of the Laws of 1872, and that the exception in the seventh section of that act, applies only to cases in which the commissioners failed to certify, that the contracts were free from fraud. The only countenance for this position, from any decision of this court, is found *In re Pugnet* (67 N. Y., 441), and in that

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case it was held that the exception did apply to cases where the work had been completed before the passage of the act of 1872, which is proved to have been the fact in this case. But I am of the opinion that the certificate of the commissioners under that act, has no effect upon the rights of parties to vacate assessments under the exception contained in the seventh section.

The purpose of the act so far as the certificate of the commissioners is concerned, was to validate all contracts which they should certify were not tainted with fraud. If so certified the contracts were, by the first section, declared to be ratified and confirmed, and to be valid and binding, otherwise they could not be held regular, unless every technical requirement had been strictly complied with. The effect of the certificate as to parties is declared in the second section, that it shall be "binding upon the mayor, &c., of the city of New York, and upon all parties to the contract, agreement or award, who signed such requirement, or who was heard before said commissioners in regard thereto." These provisions affected the city, and the contractors, and no one else. It was not contemplated that any one but the parties to the contract should institute a hearing, nor be heard before the commissioners, and in this case it appears that the contractors and the comptroller only appeared, and were bound. These provisions relate to the validity of the contracts, and bind those, and those only, who were parties to the contracts and to the proceedings.

The property holders who were to be assessed, had no opportunity to be heard, and could not upon established principles be affected by the adjudication of the commissioners. The seventh section treats of vacating assessments, and provide that they shall not be vacated for certain specified irregularities, but excepts cases of fraud, and cases of assessments for repavement of a street, which has once been done and paid for. By the construction claimed this exception would be of no value. If this is a repavement which has once been

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done and paid for, the petitioner is within the terms of the statute, and his right is not impaired by the adjudication that the contract under which the work was done, was free from fraud. I concur with the views of DAVIS, P. J., adopted by this court *In re Astor* (53 N. Y. 617).

The question remains whether this work was a repavement of the street, within the meaning of the exception contained in the seventh section of the act of 1872. The work was setting curb and gutter stones, and flagging the sidewalk which had once been done and paid for. This point has been expressly decided by this court against the city, *In re Phillips* (60 N. Y., 161). The incidental remark in the opinion, that it did not distinctly appear where the work was done, does not impair the force or effect of the decision, that laying flag-stones on the sidewalk is paving the street.

The decision has been since recognized and acted upon, *In re Burke* (62 N. Y. 224). In this case certain ordinances and other evidence were introduced, which it is claimed sheds such light upon the question as ought to induce the court to re-examine it. We have re-examined it and we do not feel justified in changing the conclusion at which we before arrived.

The ordinances speak of paving and repaving sidewalks, and also carriageways, and create a distinction by requiring that paving the former shall be done at the expense of the property owners, while the latter shall be done at the expense of the city. The evidence tends to show that, ordinarily, flagging is understood to apply to sidewalks, for the reason, doubtless, that flag-stones are generally used in paving sidewalks, and are not used in paving the carriageway. But these distinctions are not controlling. Pavement is a more comprehensive word than flagging, it includes flagging as well as other modes of making a smooth surface for streets; including side-tracks. The question is, in what sense the legislature used the term in this statute. The expert called by the city stated, that in a general sense paving included flagging; the language is "repav-

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ing any street" and not as in some of the ordinances, paving the carriageways. A *street* includes sidewalks and gutters, and when the legislature used this general term, they intended to embrace the whole street and every kind of paving, and no reason is perceived why they should not. The object of the statute was to give property owners the right to vacate assessments for this kind of work, which had once been done and paid for, for certain irregularities not allowed in other cases, and I am unable to perceive any reason why this privilege should not be available in the case of repaving a sidewalk as well as a carriageway. It was suggested on the argument that the reason for the distinction was that the repavement of the carriageway was for the benefit of the public, and that of the side-track for the property owner. If such a distinction exists it is only in degree. The public use both, but in different modes, while the property owner receives an incidental benefit from the paving of the carriageway, as well as the side-track. Besides, according to the ordinances introduced in evidence, the expense of repaving carriageways is borne by the city at large, and not by the property owners, so that the exception would have no practical effect unless it applied to sidewalks, gutters, &c. We cannot suppose that the legislature intended to confer a right upon the tax-payers which could never be used for any beneficial purpose. We think the exception should be liberally construed in the interests of those whom it was intended to benefit, and that the terms should be construed in their general and enlarged sense rather than in the restricted and conventional sense which may have prevailed among those who are engaged in performing the details of the work; especially should we do so, rather than put such a construction upon it as will deprive it of any practical benefit or operation.

It follows that the order of the general term must be reversed, and that of the special term affirmed.

All concur.

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N. Y. COMMON PLEAS.

MARY ANN McENTEERE agt. WILLIAM MCCARTHY LITTLE,
as executor, &c.

*Appeal — from general term marine court to general term of court of common
pleas — Practice in.*

The statutes regulating appeals from the general term of the marine court to the court of common pleas entirely assimilate the practice upon such appeals to that governing appeals to the court of appeals.

The practice of this court should, therefore, be the same as that laid down by the court of appeals, viz., that appeals *must* be dismissed where it appears by the return that questions of fact were legitimately before the general term of the marine court, and that the evidence was such that the court *may* have reversed the judgment on the facts.

Where a trial was had in the marine court before a judge and jury which resulted in a disagreement of the jury, and on the second trial a verdict was rendered for the plaintiff, and upon an appeal to the general term of the marine court, the case being before the general term in such a form that the exceptions and the evidence all passed under the review of that tribunal, which reversed the judgment and ordered a new trial, with costs to abide the event; on appeal by plaintiff from this decision to the court of common pleas general term:

Held, that the appeal should be dismissed and the plaintiff remitted to her new trial.

General Term, November, 1878.

APPEAL from an order of the general term of the marine court of the city of New York, reversing the judgment entered upon the verdict of the jury in favor of the plaintiff.

The action was brought to recover \$120 cash loaned the defendant, and \$235 due for wages as the lady's maid of the defendant. The answer was a general denial; a trial between

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the parties in the municipal court, Paris, France, in which judgment was rendered for defendant; the discharge of the plaintiff in Rome, Italy, March 9, 1867, during the carnival, for cause and payment in full at the time.

The action was tried on the 13th day of March, 1876, in the marine court of the city of New York, before a jury, who rendered a verdict for the plaintiff, upon which judgment was entered for the sum of \$752.35 against the defendant.

The evidence was very conflicting, and there were exceptions to rulings upon the trial, and to the charge of the judge to the jury.

The defendant appealed to the general term of the marine court, who reversed the judgment without writing any opinion, or assigning any reason.

From the order of reversal the plaintiff appealed to the general term of the court of common pleas.

George F. Langbein, for plaintiff, appellant.

Richard M. Henry, for defendant, respondent.

VAN HOESEN, *J.* — This is an action for wages and for money lent. The defendant pleaded (1st) a general denial, (2d) a former adjudication in her favor in a suit on the same demands, brought against her by the plaintiff in France, and (3d) full settlement and payment in Rome. The defendant's counsel took various exceptions during the trial and after the verdict, which was in favor of the plaintiff, made a motion for a new trial on the minutes, on the ground that the verdict was against the weight of evidence, and on the further ground that there was not sufficient evidence to support the verdict. The court at trial term denied the motion for a new trial, and the defendant excepted, and then appealed to the general term of the marine court from the judgment, and also from the order denying the motion for a new trial. The case was before the marine court, general term, in such a form that the

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exceptions and the evidence all passed under the review of the tribunal, which reversed the judgment and ordered a new trial with costs to abide the event. From that order of the general term the plaintiff appealed to this court. The counsel for the appellant insisted upon the argument that the general term reversed the judgment on the ground that the verdict was against the evidence. That proposition involved consequences fatal to the appeal. The changes that have, within the past few years, been made in the laws respecting the marine court, have altered the rules which formerly governed appeals from that court to the common pleas.

The marine court may grant new trials, and an appeal may be taken to the court of common pleas, where that power is exercised (*Secs. 9, 10 and 11, chap. 629, Laws of 1872; sec. 9, chap. 545, Laws of 1874; sec. 43, chap. 479, Laws of 1875*).

The language of the acts of 1874 and 1875, is certainly broad enough to embrace an appeal from an order granting a new trial, on the ground that the verdict of the jury was against evidence, but such, I think, was not the intention of the legislature. The language of the acts above cited is similar to, not identical with, the language of section 11, Code of Procedure. That section authorized appeals to the court of appeals from orders granting new trials, but until section 268 and 272 were amended so as to provide for a review of the findings of fact, made by a single judge or by a referee, there was no way in which the court of appeals could, on an appeal from an order granting a new trial, pass upon the evidence and the correctness of the findings. And to this very day, though the Code explicitly authorizes an appeal to the court of appeals from an order granting a new trial, there is no method known to the law by which that court can reverse the action of the general term in setting aside a verdict as against the weight of evidence. Where only pure questions of law are involved, an appeal from an order granting a new trial will lie to the court of appeals, but where the general term sets aside a verdict as against evidence, the appeal

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will be dismissed, or judgment absolute against the appellant will be pronounced by the court of appeals, unless the uncontradicted evidence indisputably shows the right of appellant to a judgment in his favor (*Wright* agt. *Hunter*, 46 *N. Y.*, 409; *Sands* agt. *Crooke*, 46 *N. Y.*, 569; *Wagner* agt. *H. R. R.*, 70 *N. Y.*, 615).

There is a long line of decisions of the court of appeals holding that the mere jurisdiction to entertain an appeal from an order granting a new trial did not impose on that court the duty of weighing conflicting evidence (*See Hoyt* agt. *Sheldon*, 19 *N. Y.*, 207; *Muller* agt. *Schuyler*, 20 *N. Y.*, 522; *Young* agt. *Davis*, 30 *N. Y.*, 134).

I think the same effect must be given to the acts of 1874 and 1875 as was given to section 11 of the Code of Procedure, and that the court of common pleas which, with respect to the marine court, is the court of last resort, cannot, with propriety, examine the testimony taken at the trial for the purpose of determining whether the general term or the jury was right in its weighing of the evidence. Whether under the present state of the law it is competent for this court to review the facts on an appeal from an order of the marine court, granting a new trial, where the action has been tried before a single judge or a referee, it is not now necessary to determine. If this court cannot review the order appealed from, and I think it clear that it cannot, if, as the appellant contends, a new trial was granted on the ground that the verdict was against the weight of evidence, it becomes important to determine what disposition should be made of this case. It appears that the respondent took exceptions which were properly included in the case. One at least of those exceptions seems to me to be good. The general denial pleaded by the defendant put the plaintiff to her proofs. There was a direct conflict between the plaintiff and the defendant as to the rate of wages to be paid, the plaintiff claimed twenty-five dollars per month and the defendant insisting that sixteen dollars per month was the amount agreed upon. Under the

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circumstances the justice at the trial told the jury that the burden of proof was on the defendant and that the plaintiff's claim was admitted. To that instruction the defendant's counsel excepted. That the instruction was wrong and that it must have prejudiced the defendant's case is obvious. For that error of the judge at the trial the general term may very properly have reversed the judgment and ordered a new trial. The exception to that instruction having been well taken, I think absolute judgment should be rendered against the plaintiff (*East River Bank agt. Kennedy*, 4 *Keyes*, 279; *Sands agt. Crooke*, 46 *N. Y.*, 279; *Cobb agt. Hatfield*, 46 *N. Y.*, 537, 538).

Order affirmed and judgment absolute against the plaintiff.
Chief justice DALY concurred.

A motion was thereupon made at the next general term, January, 1879, to modify this decision.

George F. Langbein, for the motion, made and argued the following points :

I. If the court of common pleas has not now power by law to review the facts on an appeal from an order of the general term of the marine court reversing a judgment trial by court and jury and granting a new trial the court of common pleas had no power to render judgment absolute against the plaintiff, and it should have dismissed the appeal. This is the practice and was done in all the cases cited in the opinion of the court (*Wright agt. Hunter*, 46 *N. Y.*, 409; *Sands agt. Crooke*, *id.*, 569; *Wagner agt. H. R. R.*, 20 *id.*, 615).

Each of these cases were appeals to the court of appeals, and the court dismissed the appeal and left the plaintiff to the new trial so that justice might be done, unless there was some point of law raised by the exceptions which was necessarily fatal to the plaintiff's cause of action.

In the case of *Sands agt. Crooke* (46 *N. Y.*, 564) the court of appeals so held, after holding that if the general term of

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the court below granted a new trial upon the evidence, its decision was not reviewable in that court, they examined the exceptions to see if the appeal should be dismissed or the order affirmed and the plaintiffs subjected to an absolute judgment against them. They then examined the exception whether the agreement sued upon was void for want of consideration, they found it was not, dismissed the appeal and left the plaintiffs to a new trial.

II. The court of common pleas, after holding they had no power to review the evidence, took up one of the exceptions to a refusal to a request to charge, and holding this exception well taken affirmed the order and rendered judgment absolute against the plaintiff!

a. With great respect there is no justice or reason in such action. If the justice below made an error in the conduct of the trial which is not fatal to the plaintiff's cause of action, why should she not be allowed her new trial?

b. No reason is given, and it is hard to imagine any, for rendering judgment absolute against the plaintiff. Even if this was a case where the court had a right to exercise such a power the power is discretionary. The court may do so, and it has no right to exercise the power arbitrarily. Some facts or reason must exist in justice to cut off the plaintiff from her new trial and to deprive her from all remedy to obtain what a court and jury once said was her right.

c. Any other construction of section 43, subdivision 2, Laws of 1875, chapter 479 of the marine court act, is against all reason as applicable to an inferior court where there is less learning and ability and mistakes are more likely to occur. It is the court where poor people mostly sue, and they should not be treated with such harsh severity of construction.

d. No case has yet been reported in the books upon the construction of this section, and lawyers and clients, therefore, should not be charged strictly with it against them. Especially in this case a proper examination of the evidence will show that this is not a case where severity should be

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exercised against the plaintiff. On the contrary, this is a case where the plaintiff is right upon the merits, and justice requires mildness and leniency in the exercise of the forms and practice of the law.

a. It must be remembered that this section forty-three cannot be construed in analogy to section 11 of the Code of Procedure in force when the act of 1875, section forty-three was passed. An appeal to the court of appeals could not be taken unless "the notice of appeal contained an assent on the part of the appellant that if the order be affirmed judgment absolute shall be rendered against the appellant."

If the same provision had existed in section forty-three on this appeal, from the marine court, perhaps the plaintiff would not have appealed, but would have rested content to take her new trial.

No such, or other, stipulation was given in this case and none was implied in law. The court "may" render judgment absolute if it finds no error was committed in granting the new trial. We say this means error affecting the cause of action, so that a new trial would be useless, as is the practice and justice of the court of appeals. (The court of common pleas should not adopt sharper or severer measures than the court of appeals.) Again no reason exists, in common sense or logic, to deprive the plaintiff of her new trial, simply because she appealed to the court of common pleas. With great respect, there is no justice, logic or reason in the disposition of this case by the court. It says we cannot review the evidence on this appeal therefore the plaintiff cannot have the new trial, but we must render judgment absolutely against her; we have examined one of the exceptions to the refusal of the court to charge the jury, and the exception is good, the judge committed an error, this was not fatal to the plaintiff's cause of action at all, and upon a new trial the error could be avoided, *ergo*, we do not give the plaintiff the new trial as granted by the general term of the marine court, but we render judgment absolute against her.

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What just reason actuated the court in rendering judgment absolute against the plaintiff? Because she appealed from an order granting a new trial, and the statute says, the court may render judgment absolute if it finds no error was committed. Would it not be an arbitrary exercise of power to render judgment absolute upon these grounds when the plaintiff's case is meritorious; when she has a good and just cause of action; when a jury said she had been deprived of money loaned and her wages by her employer? Wherein is the right or justice in not placing her where she was before the appeal?

We appeal to the conscience of the court on behalf of the plaintiff (*See Griffin agt. Marquardt*, 17 N. Y., 28).

III. It was always understood that the court of common pleas was the court of review on the facts and the law on appeals from the marine and district courts, so that these courts had some supervising power over them on the decision of facts.

It is in analogy to the surrogate's court and the supreme court general term. The latter reviews the facts decided by the surrogate. The whole case comes up for review, having regard only that the surrogate had the witnesses actually before him.

If the marine court general term reversed on the facts then the common pleas general term has a right to examine into the correctness and fairness of the decision, for that opens for consideration whether the judges of the general term were right in holding that the jury did not weigh the evidence properly, or were influenced by prejudice, passion or mistake, and, therefore, erred on questions of fact (*Bebee agt. Mead*, 33 N. Y., 587; *Peterson agt. Rawson*, 34 *id.*, 370; *Smith agt. Aetna Life Ins. Co.*, 49 *id.*, 211).

2d. But as the judges of the general term did not give any reason for their reversal, nor state that they reversed the same on questions of fact, and simply reversed the judgment and ordered a new trial, it is not to be deemed to have been

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reversed on questions of fact but upon questions of law only. Therefore the facts stand, and remain as found by the jury, and the only question is, was a substantial error committed upon the trial?

The court fell into an error, as appears from the latter part of the opinion, as to the exception to the refusal to charge. The position of the parties as to the issues raised by the pleadings was changed during the trial. It became a question of payment by the defendant of the money advanced and the wages to the plaintiff. The question of the rate of wages no longer became important. The defendant claimed that she had paid plaintiff in full, and this became the main issue. The defendant had the affirmative of this issue and the judge's charge was right.

There should be a reargument; at all events the judgment should now be modified so as to allow the new trial granted by the marine court and the plaintiff put where she was, or permission given to go to the court of appeals as to this new law of the power of the court of common pleas on such appeals. Some relief should be given plaintiff so that justice may be done.

Richard M. Henry, for defendant in opposition, contended, I. That plaintiff had been granted the extraordinary favor of having her appeal heard on the merits without printing or serving the case and exceptions on appeal, and should not now have any further favors granted by the court. II. That section 43, subdivision 2, chapter 479, Laws of 1875, gave the court of common pleas the power to render judgment absolute against the appellant. The plaintiff took the risk of appealing instead of a new trial, and judgment absolute being rendered against her she could not now complain.

The following decision was filed by the general term, in open court, February 3, 1879:

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VAN BRUNT, J.—As the papers upon the appeal show that the general term of the marine court may have reversed the judgment of the trial term for error of fact and not from error of law, no reargument of the appeal can possibly be necessary as this court cannot consider the appeal upon its merits. As has been shown by the opinion of Mr. justice VAN HORSSEN already delivered in this case, the statutes regulating appeals from the general term of the marine court to this court, entirely assimilate the practice upon such appeals to that governing appeals to the court of appeals. The practice in that court is distinctly laid down, that appeals must be dismissed where it appears by the return that questions of fact were legitimately before the general term, and that the evidence was such that the court may have reversed the judgment on the facts. This rule was laid down at the present general term of this court in the case of *Fay* agt. *Hazeltine*, where the court dismissed the appeal upon the ground that the reversal of the judgment of the general term of the marine court, may have been upon questions of fact which conclusion was arrived at with great reluctance, as such dismissal worked a great hardship upon the plaintiffs, and the court thought that there was a fair conflict of testimony upon which the verdict of a jury should have been final. I do not think, in the case at bar, however, that the judgment should have been affirmed, but that the appeal should have been dismissed, and the plaintiff remitted to her new trial.

The order of the general term should be modified accordingly.

C. P. DALY, Ch. J., and LARREMORE, J., concurred.

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SUPREME COURT.

PHILLIP SCHANCK agt. WILLIAM J. CONOVER.

Supplementary proceedings—provisions of Rule 25 do not apply—when order for examination lapses or is discontinued.

The provisions of Rule 25 that "whenever an application is made *ex parte* for an order the affidavit shall state whether any previous application has been made for such order, and if made to what court or judge, and what order or decision was made thereon," was not intended to apply to orders in supplementary proceedings; or if intended to apply to them such intent is inoperative.

On motion to set aside an order for the examination of a third party on proceedings supplementary to execution, it appeared by the affidavit on which such motion was based, that, upon an affidavit showing the necessary facts two orders had previously been made by a county judge that the same party appear before a referee to be examined as to the same matters in October, 1878, and the hearing of one had been adjourned to November second, said party had not been examined under either of said orders, nor had either been continued by adjournment after that date. No formal discontinuance of proceedings has been made or notice of discontinuance given:

Held, that upon the failure of the party to appear at the adjourned day the plaintiff had the right to continue the same proceedings before the county judge by another order from him in continuation of such proceedings, or he might elect to commence new proceedings by an order, *de novo*, from the same or another judge, and that such election was an abandonment of the former proceedings and a new order would be valid.

Special Term, November, 1878.

MORRIS to set aside an order for the examination of a third party on proceedings supplementary to execution.

W. S. Hubbell, for motion.

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C. E. Yale and *D. L. Johnston*, of counsel for plaintiff, opposed.

ANGLE, *J.*— On the 4th of November, 1878, an affidavit showing the issuing and return of an execution unsatisfied upon the judgment against the defendant herein; that proceedings supplementary to execution were pending against the defendant under section 292 of the Code, and that Leander J. Conover had property of the defendant and was indebted to the defendant in an amount exceeding ten dollars, I made an order requiring said Leander to appear before a referee on the 20th day of November, 1878, to answer concerning the same. This motion is made on behalf of Leander J. Conover, to set aside said order.

The first ground of the motion is, that the affidavit on which the order was granted does not, as required by Rule 25, state whether any previous application had been made for such order, and if made, to what judge, and what order or decision was made thereon.

This rule was not intended to apply to orders in supplementary proceedings, or if intended to apply to them such intent is inoperative (3 *Code Rep.*, 116; 14 *Abb. [N. S.]*, 124, 125; 55 *N. Y.*, 524; 64 *N. Y.*, 120), and this ground for the motion must be overruled.

The other ground for the motion is upon facts appearing by the affidavit, which are that, upon an affidavit showing the necessary facts, two orders had previously been made by special county judge HULLETT, that said Leander Conover appear before a referee to be examined as to the same matters, in October 1878, and the hearing of one which had been adjourned to the second November; said Conover had not been examined under either of said orders, nor had either been continued by adjournment after that date. No formal discontinuance of proceedings has been made or notice of discontinuance given.

It is claimed by counsel for Leander J. Conover, that these

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proceedings under the orders of judge HULLETT are yet pending and that the order granted by me is irregular. Counsel have argued the motion as though the decisions under section 292 were applicable to section 294, and I shall examine this question, assuming the authority of such decisions to this motion. The cases sustaining the motion are: *Allen agt. Starring* (26 How., 57); *Burkway agt. Brien* (37 How., 270); *Underwood agt. Sutcliffe* (10 Hun, 453); *Stanley agt. Lovett* (15 Hun, 412).

On the other side, and as showing that the orders of judge HULLETT had lapsed or been discontinued, are: *Thomas agt. Kircher* (15 Abb. [N. S.], 342); *Gaylord agt. Jones* (7 Hun, 480); *Squire agt. Young* (1 Bosw., 690, distinguished in 54 How., 89); *Edmonston agt. McLoud* (16 N. Y., 543); *Ballou agt. Boland* (14 Hun, 355). I shall not critically examine these cases to see if they can be reconciled or to determine which are paramount, but hold that, upon the failure of Conover to appear at the adjourned day, the plaintiff had the right to continue the same proceedings commenced before judge HULLETT by another order from him in continuation of such proceedings; or, he might elect to commence new proceedings by an order, *de novo*, from the same or another judge, and that such election was an abandonment of the former proceedings, and the new order is valid. The motion is denied, but such is the confusion in the cases that it is without costs.

Mutual Life Insurance Company agt. Davies.

N. Y. SUPERIOR COURT.

THE MUTUAL LIFE INSURANCE COMPANY agt. THOMAS A. DAVIES impleaded with others.

Principal and surety — request of creditor to prosecute — Forbearance — when surety not relieved — Notice to corporation.

A creditor is under an equitable obligation to obtain payment from the principal debtor, and the surety can, by a proper request, compel the creditor to proceed to recover the debt, and his neglect to do so will exonerate the surety,

But in order to work such result the request to prosecute must be *full and explicit* and accompanied by no conditions.

Thus where a mortgagor who had, through an assumption of the mortgage debt by others, become, in equity, surety as to them, called upon a clerk in the employment of the mortgagee (a corporation) and requested that the mortgage should be foreclosed *if taxes and assessments were allowed to accumulate and should be in arrear*:

Held, that this did not amount to a full and explicit request to foreclose the mortgage.

When it is sought to charge a corporation with notice to, or with acts or omissions of, its agents, it must appear that the notice was communicated to, or that the act or omission proceeded from, a person in the employment of the corporation charged with some duty in the premises.

A mere forbearance to collect a debt will not discharge a surety. A creditor may refrain from taking proceedings, or abandon those he has commenced, provided he discharges no lien without releasing a surety.

General Term, May, 1878.

Before, SEDGWICK, VAN VORST and SPEIR, JJ.

THE defendant Davies, made a mortgage to the plaintiffs, in 1869, to secure the payment of \$44,000, on the first of June,

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1870, with semi-annual interest. The mortgage covered lots in the city of New York, owned by Davies.

The mortgagor, subsequently to the execution of the mortgage, and during the same month in which it was made, conveyed the mortgaged premises to the defendant Cudlip. By the terms of the conveyance to him, Cudlip assumed the payment of the mortgage.

The plaintiff was advised by Davies of his conveyance to Cudlip and of his assumption of the mortgage. Cudlip, on the 15th July, 1871, conveyed the premises to John Adriance, subject to the mortgage, which he agreed to pay. Adriance died in November, 1874, but previous to his death he conveyed the premises to Nathaniel Jarvis, Jr., and others, in trust for certain purposes.

The mortgage being unpaid, this action was commenced in April, 1876, for its foreclosure.

The complaint demands judgment against the defendant Davies, personally, for any deficiencies which might arise on the sales of the mortgaged premises. The defendant Davies, by his answer, avers that the plaintiff, without his knowledge or consent, several times extended the payment of the bond accompanying the mortgage, and bound itself not to foreclose the same for a specific time, and that by reason of such extensions, he is released from all liability, on account of the mortgage.

He claims, also, to be released, by the neglect of the plaintiff to foreclose the mortgage, he having as he claims called upon the plaintiff in December, 1874, to ascertain whether there were any taxes and assessments unpaid upon the premises, with the object of having the mortgage foreclosed if such taxes and assessments were in arrear, and was then, as he claims, informed by the agent of the plaintiff, that there were no unpaid taxes and assessments.

He alleges that the company well knew, at the time of his application for information as to taxes and assessments, that his object was to procure the immediate foreclosure of the

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mortgage, in case any taxes and assessments were remaining unpaid, and protect himself from any depreciation in the value of the lands.

He claims that, at the time he was so advised that there were no taxes or assessments unpaid, there was in fact a large amount of taxes and assessments outstanding unpaid, and that the plaintiff well knew at the time that such taxes and assessments were liens upon the premises. Defendant further in his answer urges, that up to and within a reasonable time after July, 1875, the mortgaged premises were worth, and could have been sold for more than enough to have paid the mortgage, and all other claims against, and liens upon the premises.

The action was tried at special term, and a judgment of foreclosure was rendered, the defendant Davies being adjudged to pay any deficiency remaining after the application of the proceeds of the sale, according to the directions of the decree. The deficiency amounted to \$22,896.63.

The defendant Davies, appeals from so much of the judgment as holds him for the deficiency, and also from the decree itself.

Edmund Coffin, for appellant.

Herbert B. Turner, for respondent.

By the Court, VAN VORST, J. — The conveyance of the land by the defendant Davies to Cudlip, and the agreement by the latter to assume and pay the mortgage, created the relation of principal and surety between them. The effect of this transaction was, in equity, to make the land the primary fund for the payment of the mortgage debt, and to place Davies in the attitude of surety only, thereafter (*Johnson agt. Zink*, 51 N. Y., 333; *Jumel agt. Jumel*, 7 Paige, 594).

The subsequent conveyance from Cudlip to Adriance, although the latter also assumed the payment of the mortgage,

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did not affect Davies' relation as surety. It gave him the additional advantage of the agreement of Adriance. This being the relation between Davies and the grantees of the premises, of which plaintiff had notice, although Davies still remained liable on the bond accompanying the mortgage, yet the plaintiff was bound in its dealings with the grantees and others, in regard to the mortgage debt, to do nothing to the injury of Davies as surety.

A surety has a right to request the creditor to proceed without delay in the collection of the debt, and if the creditor, notwithstanding such request, neglects to proceed, and the recovery of the debt thereafter has become by such delay impossible, the surety would be discharged. Or should it appear that the creditor's means of recovery have been by delay, after such request, only partially impaired, then his obligation against the surety is impaired to the extent of the loss only (*Pain agt. Packard*, 13 *John.*, 174; *King agt. Baldwin*, 2 *John. Chy.*, 554; *S. C.*, 17 *John.*, 384; *Warren agt. Beardsley*, 8 *Wend.*, 194; *Herrick agt. Borst*, 4 *Hill*, 650; *Colgrove agt. Tallman*, 67 *N. Y.*, 95).

The reason for this conclusion being that the creditor is under an "equitable obligation" to obtain payment from the principal debtor, and the surety can by a "*full and explicit request*" compel the creditor to proceed to recover the debt, and his refusal to do so will exonerate the surety (*King agt. Baldwin, supra*).

The learned judge, before whom the trial was had, was requested by the defendant's counsel to find in substance as facts, that in November, or December 1874, the defendant Davies, at the plaintiff's office, informed William G. Davies (who was attached to the law department of the plaintiff's business) that he was anxious about the value of the security and desired to have the mortgage foreclosed if any taxes or assessments upon the premises were unpaid. That thereupon William G. Davies made an examination of the books and papers of the company and assured the defendant that there

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were no taxes or assessments unpaid, or interest in arrear. That defendant informed William G. Davies, that if any taxes or assessments should be unpaid, and in arrear, he wished the mortgage forthwith foreclosed, for his protection, which William G. Davies, thereupon, and at several times thereafter, assured him should be done.

The learned judge declined to find these facts, and the defendant excepted.

We have examined the case to ascertain whether the judge, before whom the witnesses were examined, was justified in refusing to find the facts he was requested.

From such examination we cannot conclude that the judge was in error in declining to find any portion of what was requested of him and the case in that respect may well rest upon his decision.

William G. Davies, who is a nephew of the defendant, and who was frequently consulted by him, in the plaintiff's offices, and elsewhere, in respect to his mortgages, has testified that he could not have informed the defendant that there was nothing against the property, when interest was unpaid, the December interest being in arrear, and that the entries of payment of interest were promptly made in the books. That the company's books did not, at that time, show what taxes or assessments were against the property. That he had not the information to give upon that subject. That he might have said that they knew of none. That he did not understand the defendant to direct or request that the mortgage should be foreclosed. That he very probably made a remark that he wanted it done if taxes and assessments accumulated.

Conceding that the plaintiff requested that the mortgage should be foreclosed if taxes and assessments accumulated and should be in arrear, does that amount to a "*full and explicit*" request to the plaintiff to foreclose the mortgage?

The request, it must be observed, was made of a person, who, under the evidence, had no duty, in his relations to the plaintiff, in that direction.

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The president and finance committee of the plaintiff, were the persons who had the control of such matters; they directed the foreclosure of the company's mortgages.

The person of whom the request was made was neither president, nor a member of that committee; he had no authority to direct or order the foreclosure of a mortgage.

When a request of this nature is to be made of a corporation, to be effective it should be formally made and communicated to one charged with the subject. This is the more important as a disregard of the request is followed by a release of a security. In large corporations there must needs be a systematic distribution of duties among numerous officers and agents.

And persons seeking to charge a corporation with notice to, or with acts or omissions of its agents, must see to it that the notice is communicated to, or that the act or omission proceeds from, a person charged with a duty in the premises.

By way of illustration, a communication made to the discount clerk of a bank with respect to matters clearly not under his control, but within the specific duty of the notary, paying or receiving clerk, could not well be considered a good notice to the bank, by which it would be absolutely bound. When a corporation is engaged in making investments of money, the duty of calling in loans is quite as important as that of making them. The decision, in each instance, must rest in responsible hands. The plaintiff intrusted this duty to its chief officer and principal committee, with whom the defendant, who was not a stranger to the plaintiff's officers, should have formally communicated, and especially so, as his request to foreclose was conditional, accompanied with the added service, care and judgment with respect to taxes and assessments.

But again, the defendant could not, through a notice to or request of William G. Davies, cast upon the plaintiff the duty of watching taxes and assessments so as to guard against their accumulation.

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That was a matter about which the defendant might himself have inquired, as his interest prompted, at the proper municipal offices where reliable records are kept.

The evidence shows that the books of company did not, at that time, disclose what taxes and assessments were returned against the property, and that the plaintiff had, in fact, no information to give upon that subject, and could only obtain it by an inquiry at offices, equally open to the defendant.

The person, in the plaintiff's employment, with whom the defendant communicated, according to his testimony, was not assigned to any duty of the nature of the one sought to be imposed by the defendant. He was the assistant to the solicitor of the company in its law department. This department examined vouchers, the surrender of death claims, and had the supervision of all litigated business, and general direction of it. He had no right, as assistant to the solicitor, to order the foreclosure of a mortgage for non-payment of taxes.

Had William G. Davies, therefore, chosen to act in the direction requested, it must have been for the defendant, and in his interest, and for his omission, if any, the plaintiff is not liable.

But it is urged, by the learned counsel for the defendant, that the plaintiff extended, for a time, the payment of the mortgage, at the request of Mr. Sage, the owner of a subsequent incumbrance.

It appears that the plaintiff, in January, 1875, was about to foreclose the mortgage, and had placed the same in the hands of its attorneys for that purpose. At this stage Mr. Sage came forward and paid the interest in arrear and the expenses of the preliminary proceedings, and the mortgage was returned by the attorneys to the company. Mr. Sage, in August following, paid another installment of interest on the mortgage.

He testified that he was desirous of getting an opportunity

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to investigate the value of the property, and to that end made these payments.

It is not shown that any agreement was made to extend the payment of the mortgage for a day.

The plaintiff simply forbore the collection of the debt which was due. Howsoever such forbearance of the creditors may prejudice the surety it will not, of itself, have the effect to discharge him.

A naked promise to forbear, if one was made, would work no change in the antecedent relations of the parties.

The distinction between an agreement to give time, and time given inspection of an agreement is important.

A creditor may refrain from taking proceedings, or abandon those he has commenced, provided he releases no lien, without discharging a surety (2 *Amer. Leading Cases* [*Hare & Wallace*], notes to *Pain* agt. *Packard*, and *King* agt. *Baldwin*, pp. 390 - 394).

There is nothing to show that the plaintiff was restrained by any agreement, for any length of time, from collecting the mortgage, and the defendant could, notwithstanding the payment of the interest in arrear by Sage, have at any moment paid the debt, and have been subrogated to the plaintiff's rights and remedies under the mortgage (*Calvo* agt. *Davies*, in the court of appeals, per *ANDREWS*, J.).

The manuscript opinion in that case has been handed up with the papers.

This opinion fully recognizes the position and rights of the defendant *Davies*, as surety, upon the facts appearing as above stated.

The judgment for a deficiency in this case is doubtless owing, in a large degree, to the accumulated taxes and assessments upon the premises, which were by the judgment of the special term directed to be paid out of the moneys arising on the sale of the land.

Some of these assessments accrued as early as the year 1872, and a considerable portion of the whole was a matter of record

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in the proper city offices, in December, 1874, when the defendant had the interview with the assistant solicitor, in the office of the company.

However unfortunate the result may prove to the defendant, we cannot think that the case would justify this court in casting upon the plaintiff the burden of paying these liens.

If the plaintiff was at all at fault in allowing them to accumulate, through its forbearance to foreclose, when the assessments first appeared, the defendant is not wholly free from responsibility.

If the existence of these liens depreciated the security of the mortgage, and furnished a reason for its foreclosure, the defendant, whose pecuniary interest in the matter was large, could have readily acquired a knowledge of them, and by a reasonable and explicit request to the plaintiff, could have secured himself against any loss whatever.

We fail to discover any error in the proceedings on the trial or in the judgment.

Judgment affirmed with costs.

SEDGWICK and SPEIR, concurred.

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SUPREME COURT.

OLIVER C. CHANDLER agt. THE CITY OF FON DU LAC.

Supplementary proceedings — Action against foreign corporation — order requiring third party indebted to or having property of such corporation to pay same to plaintiff on account of judgment — Corporation cannot object to order — Code of Procedure, sections 294-297.

Where an order is made, under section 297 of the Code of Procedure, directing the payment by a third person of money belonging to the judgment debtor, the latter cannot be heard to object to such order.

In an action against a foreign corporation whose property is attached under the provisions of the Code, which corporation does not appear therein, an order may be made requiring a third party indebted to or having property of such corporation and attached in such action to pay the same to the plaintiff on account of such judgment.

Special Term, January, 1879.

MOTION to vacate order of special term, made under section 297 of the Code of Procedure, directing the Merchants' National Bank to pay to the plaintiff or his attorneys certain sums of money belonging to defendant, on deposit with said bank.

The action is brought to recover the sum of \$1,400. The plaintiff in the action is not a resident of the state of New York, but resides in the state of Vermont. The summons was served upon the defendant, a foreign corporation, by publication, pursuant to an order obtained for that purpose. The defendant has not appeared herein, and judgment was entered in favor of the plaintiff on default of appearance on the 2d day of November, 1878, for the sum of \$2,878.64 as appears

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by the judgment roll filed on said day in the county clerk's office. On or about the 4th day of March, 1874, in a certain other action then pending in the supreme court, wherein the plaintiff herein was plaintiff, and the defendant herein was defendant, a warrant of attachment was issued and levied upon the sum of \$1,580, moneys of this defendant then deposited in the hands of the Mechanics' National Bank.

In the last-mentioned action the plaintiff sought judgment against the defendant, for the sum of \$2,059.20, this defendant appeared in said action, and answered, and for a long time past it has been upon the calendar awaiting trial, standing thereon as if generally reserved. On or about the 1st day of July, 1878, a warrant of attachment was issued in this action, and was levied by the sheriff upon all moneys or property of whatever description, the property of the defendant in the hands of the said Mechanics' National Bank. The only funds, property and moneys in the hands of the bank, at the time, belonging to defendant, was the sum of \$1,580, so levied on under the first attachment, on or about the 4th day of March, 1874. On or about the 13th day of November, 1878, the sheriff served upon the bank a notice that the attachment in said action, commenced in 1874, had been that day withdrawn, and the levy on said moneys released. On 14th of November, 1878, upon an affidavit of plaintiff's attorneys, setting forth, among other things, the entry of the judgment herein, the filing and docketing of the judgment roll, and that an execution had been issued against the property of the defendant, which execution said sheriff then still held unreturned, and that the Mechanics' National Bank had property of the defendant, to wit, the sum of \$1,580, on deposit to its credit, an order was made by hon. A. R. LAWRENCE for the examination of the cashier of said bank. On such examination an order was made that the said Mechanics' National Bank forthwith pay to the plaintiff, or to his attorney, to be applied towards the satisfaction of the judgment theretofore rendered therein, the sum of \$1,580, then on

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deposit, to the credit of this defendant, which were and are the same moneys which were attached under and in pursuance of said first warrant of attachment of March 4, 1874, and said other attachment issued on or about the 1st day of July, 1878.

Fullerton, Knox & Crosby, for defendant, *Chas. P. Crosby*, of counsel, appeared only for the purpose of the motion, cited *Schwinger* agt. *Hickok* (53 *N. Y.*, 280); *Bartlett* agt. *McNeill* (60 *N. Y.*, 53).

Michael H. Cardozo, for plaintiffs, cited sections 294 and 297 of the Code of Procedure; *McBride* agt. *The Farmers' Bank of Salem, Ohio* (28 *Barb.*, 476); *Miller* agt. *Adams*, (52 *N. Y.*, 409, 415, affirming, 7 *Lansing*, 131); *Gibson, Assignee*, agt. *Haggerty* (37 *N. Y.*, 555).

BARRETT, J. — The judgment was but *quasi in rem*. It was in form *in personam*, and its effect was simply to limit the execution. There was no good reason why, as against the defendant, and for the limited amount, the judgment should not be enforced as to that extent *in personam* through section 294 of the Code of Procedure. It cannot complain so long as the order does not reach beyond the property attached. It was for the third person to object to the methods adopted, but they submitted to the jurisdiction.

Motion denied, with ten dollars costs, and stay vacated.

Garner agt. Thorn.

N. Y. SUPERIOR COURT.

HARRIET M. GARNER and another agt. WILLIAM E. THORN
and others.

Demurrer to complaint — Entirety of a cause of action — What constitutes a single cause of action as distinguished from several causes of action — Code of Civil Procedure, section 484.

The general rule in equity pleading is, that a bill may be filed against several persons relative to matters of the same nature forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were, more or less, concerned, though not guilty, in each act.

The Code has not essentially altered the rules of equity pleading as it regards multifariousness.

The language of section 484 of the Code of Civil Procedure *seems* to be intended to apply to equitable actions which frequently embrace complicated acts and transactions relating to the subject-matter of the action which it would be desirable to settle in a single controversy, and should not interfere with settled doctrines of equitable procedure, pleadings, parties and remedies.

In the case of the maladministration of an estate, where an action is brought for the purpose of securing and protecting a trust, the complaint, after stating the facts necessary to show the origin and history of the trust, sets forth the legal rights of the plaintiffs and the liabilities of the different defendants in respect to the trust fund and acts and malfeasance of the defendant T., as trustee, and that he is chiefly concerned to promote the interest of G. & Co., instead of that of the trust, and it concludes with a prayer for relief in various forms adapted to the liability set forth in the complaint:

Held, that the preservation and restoration of the trust fund in its entirety is the subject-matter, "*the cause of action*," in a suit brought for that purpose, no matter how many acts of mismanagement are alleged, nor how many parties, strangers to each other, are involved in the possession, or claim the different parts of the estate.

Held, also, that although it appears that all of the defendants were not

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jointly concerned in every act of wrong, there are a series of acts on the part of the persons concerned in its management, and produced by the same fraudulent intent, which contributed to the injury of the plaintiffs. The several matters charged are not so distinct and unconnected as to render the joining of them in one complaint a ground of demurrer.

The issues presented in the complaint are not such as are required to be separately tried by a court of equity; and although the reliefs growing out of the bill and prayed for in respect to the several defendants are according to their respective liabilities, it is still but one subject-matter of action.

A prayer for judgment is not demurrable.

Special Term, November, 1878.

THE action is brought by Harriet H. Garner, widow of Thomas Garner, Jr., deceased, and her daughter Fanny M. Garner, the only child of Harriet H. and Thomas Garner, Jr., for the purpose of securing and protecting a trust of \$1,000,000.

A concise statement of the complaint is important to show the origin and history of the trust.

Thomas Garner, Sr., by a bequest in his will gave to his son Thomas Garner, Jr., the sum of \$1,000,000 to be paid to him within eighteen months after the father's death. His son William T. Garner qualified as sole executor, and by the terms of the trust was bound to make payment of this fund out of his father's estate, which was estimated at more than six millions of dollars at the time of his death, when the one million of dollars was locked up in the firm of Garner & Co., composed of William T. and Thomas, Jr. After the expiration of eighteen months and before the legacy had been paid Thomas Garner, Jr., died leaving to his wife and daughter, the plaintiffs, the legacy of \$1,000,000, independent of his interest in the firm, and appointed his brother William T. and the defendant Thorn executors and trustees. They both qualified and became chargeable with the responsibilities of the trust to collect and receive, and William, as execu-

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tor of his father's will, to pay ; but instead of doing so the money was retained in the firm and never separated from the estate of his brother Thomas.

When Thomas, Jr., died, the firm was carried on by William T. and the defendant Johnson, and the former, as executor of his father, by entries in the firm's books, debited the estate of his father and credited the estate of his brother with the amount of the legacy by giving to himself and Thorn, as trustees, a mortgage of \$90,000 on property belonging to him in Monroe county, and procuring the Harmony Mills (a manufacturing company, of which he was the president and owner of the stock) to execute another bond and mortgage for \$710,000, out of the \$990,000 to himself and Thorn, as trustees of his brother's estate, and charged the rest as payments, which, according to the allegations of the complaint, had not been made.

This is alleged to be an improper investment of trust funds ; that the property covered by the first mortgage of \$90,000 was part of the estate of Thomas Garner, Sr., and acquired by William T. as residuary devisee under his father's will ; that the Harmony Mills was in name a corporation, but owned by Garner & Co., and that the mortgage thereon was not lawfully executed, and that both pieces of property were subject to two mortgages of equal amounts, without priority, the one over the other, to the estate of Anna Garner, who, by the will of Thomas Garner, Sr., was also bequeathed an equal legacy of a million dollars ; that the property covered by the mortgages is wholly inadequate, the security precarious and the whole trust fund imperiled, and that the object of the whole arrangement was not to take care of the trust, but to appropriate the trust money for the use of Garner & Co. ; that the death of William T. Garner left the whole trust property and his whole estate, including the million dollars of the trust fund, in the hands of Johnson as surviving partner, subject to the perils of the business, under a will by which, during the lifetime of a daughter named, the business is to be carried

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on by Johnson, as survivor, and by the executors, Thorn, Lawrence and Johnson.

The complaint then sets forth the legal rights of the plaintiffs and the liabilities of the different defendants in respect to the trust fund and acts of malfeasance and hostility on the part of the defendant Thorn as trustee, and that he is chiefly concerned to promote the interest of Garner & Co., instead of that of the trust, and it concludes with a prayer for relief in various forms adapted to the liability set forth in the complaint.

Cole & Kingsford, for plaintiffs. *Joseph H. Choate*, of counsel.

Marsh & Wallis, for defendants Thorn and Harmony Mills. *Luther R. Marsh*, of counsel.

Homer A. Nelson, for defendants, executors of Garner.

Nathaniel S. Smith, for defendant S. W. Johnson.

SPEIR, J. — It is apparent, from the foregoing concise statement of the complaint, that the one subject-matter of the action is the trust, and the cause of action the several violations and misappropriations of which it has been the subject.

The object of the suit is a legitimate one, and peculiarly appeals to a court of equity to accomplish its purpose. If the allegations are true, and as such they are to be taken on this demurrer, this is an unjustifiable and inexcusable disregard of the plain performance of a duty voluntarily assumed by executors and trustees, and a willful and fraudulent appropriation by them and the other defendants of funds devoted, in terms, for the protection and support of the beneficiaries of the trust. It is clear that the plaintiffs are entitled to the protection and relief of the court. The only question here is, whether they must seek it by separate suits against each of the individuals implicated in the transactions, or whether they are at liberty to bring them all into court in one suit.

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The complaint recites but one connected history of this trust fund. It begins with its origin under the will of Thomas Garner, Sr., and comes down in one unbroken line through the various trustees and other defendants to the present time.

Although it appears that all of the defendants were not jointly concerned in every act of wrong, there are a series of acts on the part of the persons concerned in its management, and produced by the same fraudulent intent, which contributed to the injury of the plaintiffs. The question is, whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer? Chancellor KENT, in *Brinkerhoff agt. Brown* (6 *John. Chan.*, 139), a leading case, says, after citing several cases: "The principle to be adduced from these cases is, that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are, more or less, concerned, though their rights in respect to the general subject of the case may be distinct." Again, he says: "The remedy would, of course, be varied and adapted to the case of each individual defendant if the general charge of fraud should be established; and if it should only be established in part as against some of the defendants and not as against others, the decree would also then be adapted to the proof. I do not see that this circumstance can create any difficulty in sustaining the bill. It is cheapest and best, for the interest of all parties, that the subject of all the fraud, in all its parts, should be investigated and settled in one suit (*See, also, Fellows agt. Fellows*, 4 *Cowen*, 682; *Story's Equity Pleadings*, 285, 285a, 286 and 286a, and cases cited). The whole doctrine seems to be summed up in section 539.

The general rule in equity pleading being thus established it follows that demurrers of this kind should be cautiously received. The pleader in every complicated case embracing a series of fraudulent transactions among various defendants, intimately and more remotely connected as the present one,

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must find much difficulty and peril attending the selection of proper parties.

We have here four several demurrers interposed to the complaint, in substance the same, specifying nine supposed different causes of action. It is now well settled that the Code has not essentially altered the rules of equity pleading as it regards multifariousness. Indeed, the comprehensive, vague and uncertain language of the four hundred and eighty-fourth section seems to be intended to apply to equitable actions which frequently embrace complicated acts and transactions relating to the subject-matter of the action which it would be desirable to settle in a single controversy and should not interfere with settled doctrines of equitable procedure, pleadings, parties and remedies (*Pomeroy on Remedies and Remedial Rights*, 496 ; *Wyles agt. Suydam*, 64 *N. Y.*, 198).

The objection is taken that here there is an improper joinder under the four hundred and eighty-fourth section of the Code. The objection is based upon the fallacy of supposing that the cause of action is the trust fund, whereas the cause of action, as before stated, being the violations and misappropriations of the trust, it is plain that these causes arise out of transactions connected with the same subject-matter of action, which is the trust itself. The error consists, I think, in not clearly distinguishing the question of proper or necessary parties to a suit in equity from the question of misjoinder of causes of action, and of confounding the distinct prayers for relief with distinct causes of action. An attentive reading of the different branches of the prayer for judgment and the nine supposed different causes of action specified in the demurrer will show that the real grounds of demurrer are founded upon the several grounds for relief. The latter may be wholly omitted in the complaint, yet the plaintiffs would be entitled to such relief as they could establish upon proper proofs of alleged facts. The prayer for judgment is not demurrable.

Among other examples the counsel takes the case of the
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Harmony Mills as being improperly joined as defendant. The prayer is, that by an interlocutory judgment, or otherwise, it may be compelled to execute a suitable instrument ratifying and confirming the mortgage of \$710,000, and that the defendants Johnson and Thorn and the executors and trustees of William T. Garner, deceased, as stockholders, may be compelled to give their written consent thereto. It appearing in the complaint that this mortgage was executed, without the assent of the stockholders, by the trustees, and was intended as a money payment of the trust fund on the books of Garner & Co.; that the stock of the corporation was, in fact, nearly all owned by that firm and is wholly an insecure and improper investment, and constituted as it stands, a security for the trust money, can there be a question but that it is a proper and necessary party; and that a separate suit is not necessary to secure the relief asked for in the bill? It is true an action might be brought against the firm of Garner & Co., or against the estate of Thomas Garner, Sr., to rescue the trust money from their hands and correct the informality in the mortgage; but a court of equity, in view of the conduct of the several defendants as set forth in the complaint, will not, I apprehend, consent to any measures of delay or unnecessary expensive litigation whereby the whole fund may be absolutely squandered and lost to these plaintiffs. These statements are not made as separate and distinct causes of action against the several defendants, but a cause of action is alleged, by which they are all affected, and in respect to which they are necessary parties.

It is claimed by defendant's counsel that the main and primary object of the suit was the removal of the defendant Thorn, as trustee, and that is the cause of action set forth. In this I think the learned counsel are mistaken. As before stated, and which clearly appears from the complaint, the cause of action consists in the several violations and misappropriations which the trust estate has suffered in passing through the hands of the various defendants, and with which

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they have been more or less connected. The restoration and preservation of the trust fund is the primary and important subject-matter of the action. If the court, in the exercise of its equitable powers, should conclude on the whole case that the removal of Thorn is necessary for the protection of the fund, it will then remove him.

The issues presented in the complaint are not such as are required to be separately tried by a court of equity, and although the reliefs growing out of the bill and prayed for in respect to the several defendants are according to their respective liabilities, it is still but one subject-matter of action.

The demurrer should be overruled and judgment ordered for the plaintiffs with costs.

Matter of Chesebrough.

SUPREME COURT.

In the Matter of the Petition of CHARLES A. CHESEBROUGH to vacate an assessment for underground drains between One Hundred and Seventy-third and One Hundred and Eighty-third streets, the Kingsbridge road and the Hudson river.

Assessments — for underground drains, when unauthorized — cannot be sustained as a sanitary measure without compensation to owner — Substantial error sufficient to authorize relief — Laches.

The construction of an underground drain in the city of New York through private property without the consent of the owner, and without any compensation being awarded to him for the easement acquired in his lands, is unauthorized and an assessment therefor will be vacated and set aside.

Nor can the assessment be maintained on the ground of its being a sanitary measure, the health department, through its proper officer, having certified as to the necessity for building the drains for the protection of the public health in accordance with the provisions of chapter 566 of the Laws of 1871.

The construction of drains as a *sanitary* measure, cannot be undertaken or sustained without making just compensation to the owner for the easement thereby acquired in his lands.

Where *substantial error* is shown, in this class of cases, the petitioner may have relief in this form of proceeding, under the provisions of chapter 812 and 813 of the Laws of 1874, and it is not necessary to show *actual fraud*.

A mere neglect to physically resist an illegal or unconstitutional exercise of an alleged power on the part of the state or of the municipal authorities, does not deprive the individual, when a right is claimed under such illegal or unconstitutional action, from insisting upon his rights.

Whether the doctrine of *laches* applies to legal rights or should be restricted in its application to equitable rights only, *quære?*

Special Term, December, 1878.

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Alexander B. Johnson, for petitioner.

John A. Beall, for city.

LAWRENCE, J.—I do not coincide with the learned counsel for the corporation in the opinion stated in his points on the argument of this motion, that the irresistible conclusion from the authorities is that no error short of actual fraud will authorize the vacation of an assessment, in this form of proceeding, nor that it is, therefore, utterly immaterial whether or not the commissioner had lawful authority to lay the drains.

Since this motion was argued the court of appeals, in the *Matter of the Petition of the Emigrant Industrial Savings Bank*, where a similar position was assumed by the counsel for the city, in alluding to the point, have used this language: "It is further contended, on the part of the city, that chapter 313 of the Laws of 1874 debars the petitioner from the remedy that he seeks by this proceeding, no actual fraud being shown. It is not necessary to discuss that point at length, as in two cases recently before this court we have held that the proof of fraud is necessary only where the error or irregularity complained of is one of those enumerated in the act, and that where the error is not one of those thus enumerated and is substantial, the proceeding is maintainable without showing fraud. This result follows from construing chapter 313 of the Laws of 1874 in connection with chapter 312 of the same year, which is in *pari materia* (*In re Protestant Episcopal Public School*, and *In re Walter*, decided November, 1878."

* * * "The whole context of chapter 313, read in connection with chapter 312, and the character of the irregularities specified, shows that the intention of the act was to guard against assessments being set aside, for mere errors of form or technical irregularities or defects, but not to prevent redress in cases of substantial error."

It seems to me, therefore, to follow from the latest decisions of the court of appeals, in reference to this class of cases,

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that where substantial error is shown the petitioner may have relief in this form of proceeding, under the provisions of chapters 312 and 313 of the Laws of 1874.

It is alleged, in this case, that there is a substantial error in the assessment for the reason that the work was done in and upon the petitioner's private lands without his consent, and without any compensation being awarded to him for the easement acquired in his lands. The assessment is justified by the city, on the ground that the work was done under the provisions of chapter 566 of the Laws of 1871. By section 1st of that act it is provided: "Whenever it shall appear to be necessary for the protection of the public health that any part or parcel of land, within the corporate limits of the city and county of New York, needs to be drained by other means than by sewers, and it shall be so certified by the city sanitary inspector, and said certificate is filed among the records of the board of health of the health department of said city, the said board shall direct that the same shall be done by and under the direction of the department of public works of said city and county."

The second section of the act provides "that all parts and parcels of land lying below the levels of the sewers adjacent thereto upon which surface water remains stagnant, or through which water-courses have or at present do run, may be so drained by a properly constructed blind drain, which shall be carried along such natural water-course, until it can be made to enter any sewer at its proper level, or if such sewer cannot be reached, it shall be carried to the adjacent river."

The third section provides that all lands, &c., benefited by said drain directly or indirectly shall be liable to assessment, &c., for such benefit.

The counsel for the petitioner contends that under the recent decisions of the court of appeals, *In the Matter of Rhineland* (68 N. Y., p. 105), and *The People agt. Haines* (49 N. Y., 587), the assessment upon the petitioner's lands for drains constructed through his lands without his permission

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and consent, and without compensation to him, is absolutely void. In the case of *Rhineland* it was held, that the construction of a sewer in the city of New York through private property without the consent of the owner is unauthorized, and that the municipal authorities in constructing the sewer there were trespassers, and that no assessment could be legally laid to pay the expense of such a trespass.

In the case of *The People agt. Haines* (49 *N. Y.*, p. 587), it was held that the occupancy and use of lands for constructing and maintaining ditches, as authorized by the provisions of the act appointing commissioners for draining certain lands in the town of Royalton, Niagara county (*chap. 774, Laws of 1867*), is such an interference with the rights of the owner as entitles him to the just compensation made necessary by the Constitution; and it was further held that the act in question contemplated the imposition of a burden upon the lands, subjecting them to an easement in behalf of the public, derogatory to the rights of the proprietor.

I should have been inclined to uphold the assessment in this case, on the ground that the act of 1871 was a proper exercise of the sanitary powers of the state for the protection of the health and lives of its citizens, if I did not deem myself controlled by the decisions in the two cases just referred to. The construction of a sewer through the private lands of Mr. Rhineland, for aught that appears to the contrary, was as necessary to preserve the public health as the construction of blind drains through the private property of the petitioner in this case. A proper system of sewerage is quite as essential to the promotion of the sanitary condition of the city as the construction of drains (which are diminutive sewers) through private property.

If the one cannot be upheld when the carrying out of the system involves the running of the sewer through private property without paying for the easement to which the land is thus subjected, how can the other be sustained unless proper compensation is made? If it be said that under the act of

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1871 the health department, through its proper officer, is required to certify as to the necessity for building the drains for the protection of the public health, and that no such point arose in the case of Rhinelander, the answer seems to be this: In the case of *The People agt. Haines (supra)* the act contained this preamble: "Whereas, in the judgment of the legislature of the state of New York it is needful for the public health of the people living about certain low lands in the town of Royalton in Niagara county, that the said lands should be drained and reclaimed, therefore," &c., &c. This act, therefore, contained a declaration that in the judgment of the people of the entire state, represented in senate and assembly, it was necessary for sanitary purposes to drain and reclaim the lands referred to in the act.

Such a judgment must be of the same binding force and effect when courts are called upon to uphold an exercise of power, on the ground that the power is of a sanitary character, as the judgment of a board which derives its whole authority to pass upon the question of a sanitary necessity from the legislature. And if in the former case the construction of drains as a sanitary measure could not be undertaken or sustained without making compensation to the owner for the easement thereby acquired in his lands, such construction cannot be made in the latter case in the absence of such compensation.

There were several grounds urged by the learned counsel for the city, such as *laches* and neglect to prosecute this proceeding, as a reason for denying the petitioner's application, but I do not regard them as answers to the petitioner's points.

A mere neglect to physically resist an illegal or unconstitutional exercise of an alleged power on the part of the state, or of the municipal authorities, does not deprive the individual, when a right is claimed under such illegal or unconstitutional action, from insisting upon his rights.

For these reasons I am of the opinion that the prayer of the petitioner should be granted and the assessment vacated.

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COURT OF APPEALS.

JAMES CREGIN, respondent, agt. BROOKLYN CROSS TOWN
RAILROAD COMPANY, appellant.

Survivorship of actions.

Under the provisions of 2 Revised Statutes (*page 447, secs. 1 and 2*) a cause of action which a husband has against a railroad company for the loss of services of his wife, who was injured while in the act of getting off their cars while a passenger, through the negligence of the company, survives and may be continued by the personal representative of such husband (*Affirming, S. C., ante, 32*).

January, 1879.

THE facts are fully set forth at *ante*, page 32.

J. Warren Lawton, for plaintiff, respondent.

Britton & Ely, for defendant, appellant.

RAPALLO, *J.*— We think the appellant is correct in the position that this is an action grounded in tort.

The complaint alleges that the defendant received plaintiff's wife in one of its cars as a passenger; that she paid her fare, and while she was such passenger she was thrown down and injured by the negligence of the defendant. No contract with the plaintiff is alleged, and the *gravamen* of the complaint is the wrongful injury to the person of his wife.

The cause of action is, therefore, one which, at common law, would have abated by the death of the plaintiff, and the

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only point to be considered is whether, under the provisions of 2 Revised Statutes (*page 447, secs. 1 and 2*), it survives.

Section 1 preserves from abatement by death actions "for wrongs done to the property, rights or interests of another." This language is very broad and embraces a large class of actions. It is not confined to direct injuries to property, but includes all injuries to the rights or interests of a deceased party, except such as are enumerated and excepted in the following section, number 2. These are actions for slander, libel, assault and battery, false imprisonment and actions on the case for injuries to the *person of the plaintiff*. These exceptions necessarily prevent the surviving of any action for slander, libel, assault and battery or false imprisonment, or for any injury to the person of any deceased plaintiff, however seriously such injury may have affected his property or estate. But they do not cover an action for a wrong done to his rights or interests, even though this wrong may have been effected by means of an injury to the person, provided the injury was not to the person of the plaintiff but of some other party.

The rights and interests for tortious injuries, to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished. The exceptions in the statute are such as scarcely to leave any conceivable action for injuries to other rights uncovered by them. But where an injury to pecuniary interests is shown the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted in section 2.

All pecuniary injuries (not resulting from the enumerated and excepted causes, such as assault and battery, slander, &c.) are placed upon the same footing when occasioned by a tort as if arising from breach of contract; and such is the language of the statute. It declares that for wrongs done to the rights

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or interests of another (except the specified wrongs) the cause of action shall survive in the same manner and with the like effect in all respects as actions founded upon contracts. In *Haight agt. Hoyt* (19 N. Y., 464, 468) it is said by GROVER, J., that the exceptions contained in the second section manifest the intention of the legislature that all other actions founded upon tort should survive; and in the same case, at page 474, DENIO, J., says that the action (which was for false representations) was for "a wrong done" to "the rights and interests" of the plaintiffs, and that the exception in section 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace the case.

The wrong done in the present case is alleged in the complaint to have been wrongful injury to the person of the plaintiff's wife, whereby she was rendered permanently unable to attend to her household and other duties and the plaintiff was obliged to expend sums of money in procuring medicines and necessities, and employing physicians to treat her for her injuries and that he had been and would be permanently deprived of her services and comforts.

This we think was a wrong done to the rights and interests of the husband. He had a right to the services of his wife, they were of pecuniary value to him, and any wrong, by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests. Adopting the construction that pecuniary rights and interests only are protected by the statute, these were plainly involved, and if the pleader had left out the word "comforts," the complaint would have disclosed an injury to pecuniary interests exclusively. We do not think that, because in addition to the injury to these interests, the personal comfort of the plaintiff was interfered with, that circumstance should deprive representatives of their remedy for the pecuniary injuries which he sustained, and which diminished his estate, nor do we think that it can be laid down as a rule of universal application to all classes

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of society, that in such a case the injury to the personal feelings and comfort of the husband is the *gravamen* of the wrong and the pecuniary injury a mere incident, of which the law will not take notice independently of the former.

Where any injury is done to the person of *the plaintiff* the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single, and consists of the injury to the person; the damages are the consequence merely of that injury and when by the terms of the statute such a cause of action abates, the character of the damages cannot save it. But where the cause of action is not one of those enumerated in the statute the character of the damages may control the question whether there is an injury to the property, rights or interests of the plaintiff.

The case of *Wade agt. Kalbfleisch* (58 N. Y., 282) does not conflict with these views. The question of law involved in that case was whether the action was on contract, or for a personal injury. The majority of the court held that it was an action for a personal injury and that although pecuniary interests might be incidentally involved, the injury to them did not constitute the cause of action. This clearly appears from the prevailing opinion of CHURCH, Ch. J., who says at page 287, that the action (breach of promise of marriage) was *sui generis*; that the form of action was not material. That the controlling consideration was that it did not relate to property interests but to personal injuries. Granting that it was not an action on contract but was one for personal injuries, the conclusion necessarily followed. The injuries were to the person of the plaintiff and the case was within the very letter of the exception contained in section 2 of the statute. Even though it was a tort affecting the rights and interests of the plaintiff, if it was an injury to her person it could not survive. The present action was for a tort which affected injuriously the rights and pecuniary interests of the plaintiff. It was, therefore, for a wrong done to those rights and interests,

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and is covered by section 1 of the statute. The cause of action was not an injury to his person nor any of the others enumerated in section 2, and is not within the exception. It must, therefore, be held to survive with like effect as if the action were on contract.

The order should be affirmed with costs.

All concur, MILLER and EARL, JJ., absent at argument.

NOTE.— Would not the cause of action in this case have survived irrespective of the statute? The action arose out of *assumpsit*, and though in form for a wrong, it is founded on contract. It is founded on an "engagement" *i. e.* (to safely carry the plaintiff's wife), and is technically a "claim." The failure to safely carry is the breach? [RE.]

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SUPREME COURT.

In the Matter of an Application for a mandamus by WEED, PARSONS & Co. agt. ALLEN C. BEACH, secretary of state, and FREDERICK P. OLCOTT, comptroller of the state of New York.

Mandamus — state printing — When unsuccessful bidder not entitled to writ to compel secretary of state and comptroller to change their award.

The law to provide for state printing (*chapter 24 of Laws of 1846*) requiring the secretary of state and comptroller to give notice, as prescribed therein, that they will receive bids for printing, and on the expiration of the notice "open said proposals and enter into a contract, or contracts, with such person or firm as shall make the lowest offer or bid to do such printing," and they having made an award, another party claiming that the bid of the successful party was not in accordance with the proposals and that their's was and that they were the lowest bidders, is not entitled to a mandamus directing the secretary of state and comptroller to canvass again the bids received and award the contract to them.

Where the law requires, as it does in this matter, that a contract shall be made "with such person or firm as shall make the lowest offer or bid," such bid must substantially conform to the proposals made.

On motion for a peremptory mandamus in this matter:

Held, that the motion should be denied, because,

First. The moving parties present no better claim to the printing than their successful competitor, both bids being informal in matters of substance.

Second. No bidder in his offer followed the proposals. Every bid including those of the applicant was radically defective.

Third. The state officers having endeavored to obtain bids in a certain form and failed were at liberty, as against such faulty bidders, to examine all and according to their best judgment, award the contract to the lowest bidder.

Fourth. A contract to do the printing having been actually made with another party, this court should not, on the authority of *The People*

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ex rel. Belden agt. The Contracting Board (27 N. Y., 878), grant the relief asked for, even though the bid of the applicants was in proper form and lower than that of the party to whom the work was let.

Albany Special Term, February, 1879.

MOTION for a peremptory mandamus.

Henry Smith, for motion.

A. Schoonmaker, Jr., attorney-general, opposed.

WESTBROOK, J. — In pursuance of chapter 24 of the Laws of 1846, the secretary of state and the comptroller issued "proposals for department printing." Bids were received from The Argus Company, Weed, Parsons & Co. and several other parties. On the 20th day of January, 1879, a contract was made with The Argus Company to do such printing, and Weed, Parsons & Co. claiming that the bid of The Argus Company was not one in accordance with the proposals and that their's was and was also the lowest in amount of all the offers, ask that the said secretary of state and comptroller be directed to canvass the bids received and award the contract, for which proposals were invited, to them.

The act, chapter 24 of the Laws of 1846, requires the secretary of state and the comptroller to give notice, as prescribed therein, that they will receive bids for printing, and on the expiration of the notice "open said proposals and enter into a contract, or contracts, with such person or firm as shall make the lowest offer or bid to do such printing."

The advertisement for bids declared: "For all printing in book or pamphlet form for any of the state offices, or for circulars on cap or post paper, the proposal should state the price for 1,000 ems for composition, restricting the estimate to the printed lines, and separately the price for paper, press work, folding, gathering, collating, stitching and trimming for 100

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copies, and the rate per hundred for each additional hundred copies required."

The advertisement further said: "Samples of the blanks and other printing required for the said public offices may be seen at the office of the secretary of state and the other state departments, and the proposals must state the price, by the hundred, for blanks of every description used in any or either of the said departments."

The bid of The Argus Company, which was accepted, declared that it would do "the 'department printing' for the state of New York, in accordance with all the terms and conditions of the advertisement of the secretary of state and comptroller, a copy of which is hereto attached, at the following prices:

"Composition for one thousand ems, fifty cents.

"For paper, press work, folding, gathering, collating, stitching and trimming, per 100 copies, fifty-three cents; and for each additional 100 copies, fifty-three cents.

"And we hereby further agree to do all the department printing, in accordance with the terms of said advertisement, for the gross sum of thirty-four thousand dollars."

The contract made with The Argus Company specifically provides for doing the work at the prices set forth in the bid, and then declares "the whole sum claimed or allowed and paid for the printing, work done and performed and materials, as herein required to be done, performed and furnished," shall not "exceed the sum of sixteen thousand dollars."

It does not require argument to show that when the law requires, as it does in the matter of the printing, which is the subject of controversy upon this application, that a contract shall be made "with such person or firm as shall make the lowest offer or bid," that such bid must substantially conform to the proposals made. Any other rule would destroy all fair competition. If, for example, the bids are required by the proposals to be upon different kinds of work, the price for each to be separately stated, a bid in gross for all the work

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should not be received, because those not thus bidding have not been called upon to compete for any such thing; and the acceptance of any such gross bid is a violation of the law, because the law requires competition and that has not been secured.

In testing the bid of The Argus Company, which was accepted, reference must be made to the proposal. So much of that as is necessary for the purpose of this discussion has been given. It will be remembered that that required bids as follows: First. "For all printing *in book* or *pamphlet* form for any of the state offices, or for *circulars* on cap or post paper." The price for the composition of such work for 1,000 ems, restricting the estimate to the printed lines, was to be given, and then the price for paper, press work, folding, gathering, collating, stitching and trimming for 100 copies, and the rate per hundred for each additional hundred copies required were to be separately stated; and, second, for such *blanks* as were used in the public offices, the price of which "by the hundred," it was declared, "the proposals must state."

If the bid of The Argus Company be examined it will be found that there is no proposal or bid for "blanks," *eo nomine*, and, consequently, no price specified at which they will be furnished "by the hundred." It is possible that they were intended to be covered by the offer which specifies the price of composition per thousand ems, and that for paper, press work, &c.; but it is clear that there is no bid for them in the form required, and that, consequently, such bid could not compete with those in proper form, if any such there were.

Neither was the offer made by The Argus Company to do the work for a gross sum one which, as against any conforming to the specified requirements, should have been acted upon, for it was in a form for which no competition had been invited, and for which none was secured. It is true, that it is urged, that no bid in gross has been accepted, but it is clear that the party making it has, by the terms of the contract,

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secured the benefit thereof in inducing the agreement. By inserting in such agreement a clause that the price paid should not exceed a gross sum named, it can be argued as it has been, though detailed prices mentioned are higher than those offered by others, yet as the effect thereof is limited by a gross sum to be paid for all work done thereunder, that such agreement secures a lower price to the state than the offer made by competitors. That the gross bid of The Argus Company has really controlled the contract will be manifest by comparing its bid and contract with the offer of Weed, Parsons & Co., and from the perusal of the opposing affidavit made by the secretary of state and the comptroller on this motion.

The bid and contract of The Argus Company was "fifty cents for each 1,000 ems of actual composition," and "the further sum of fifty-three cents for all paper, press work, pressing, folding, gathering, collating, stitching and trimming for each 100 copies of a signature of eight pages of any blank, circular, book, pamphlet, school register, canal collector's certificate, blank or slip of law."

The bid of Weed, Parsons & Co., for the same species of composition (except certain things, for which a separate offer was made), was fifty cents, and for the stitching and binding, etc., etc., fifty cents. In other words, The Argus Company received one dollar and three cents for work, a part of which, at least, Weed, Parsons & Co., offer to do for one dollar.

Messrs. Beach and Olcott depose that Weed, Parsons & Co., "have had the contract for the printing for the state departments and state offices, for a great many years past, and that, according to the best information accessible, from the records and vouchers in the comptroller's office and the appropriations made, the cost of such printing has for many years exceeded the aggregate to which the same will amount, under the contract with The Argus Company, and that the cost thereof, according to deponents' best information and belief, exceeded for the past two years, the sum of \$35,000, and that by the con-

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tract with The Argus Company the total cost is limited to \$32,000 for two years."

It is apparent, therefore, that while the contract with The Argus Company does not profess to be for a gross sum, and though other considerations, which are stated in the affidavits of the secretary of state and comptroller, may have induced them to suppose that The Argus bid and contract were more advantageous to the state than the offer of Weed, Parsons & Co., yet that the offer in gross and the limitation upon the total cost of all the work done, were important factors in the procurement of the contract sought to be annulled. As, then, The Argus bid varied from the advertisement in important particulars, the motion for the mandamus, if the court has the power to do what it is asked to do, might be granted, provided there are no legal exceptions to the bid of Weed, Parsons & Co., and whether there are or are not any such will now be considered.

It has already been stated that the advertisement required offers or bids "for *all* printing in *book* or *pamphlet* form
* * * or for *circulars* on cap or post paper" at a price "for one thousand ems of composition," with a separate statement of the cost per hundred for paper, press work, etc., and for *blanks* the price per hundred." No offer specifying the price of any book, or pamphlet for each copy thereof, was invited.

The bid of Weed, Parsons & Co., upon books and pamphlets, instead of being confined to the price of composition for 1,000 ems, and a separate statement of the cost of binding, stitching, etc., as the advertisement required, placed upon certain specified ones a price per copy. After making propositions, which closely followed the proposals, separate and distinct offers are made to supply the "Legislative Manual," "School Registry Books," and "Calendar for the office of the Clerk of the Court of Appeals," at a stated price for each copy thereof. The effect of this is to take these items out of their general bid. If then their offer be accepted,

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Weed, Parsons & Co., will secure a contract in a form and upon a basis on which others have not competed. Precisely the same argument can be used against them, which can be made against The Argus Company. Their offer is for a gross price per book or pamphlet upon certain books and pamphlets, whilst that of The Argus is limited by a gross sum for all work. If competition was not invited for the latter it was not for the former, and the objection to the acceptance of either is plain.

Having reached the conclusion that grave objections can be made to a contract founded upon either the bid of The Argus Company or that of the applicants, it follows that no order can be made to the extent asked for upon this motion. It has been a matter of some doubt, however, whether an order should or should not be made directing the issue of new proposals, and the making of a contract thereunder, provided the court had that power. The conclusion has been reached to simply deny the motion and make no further order whatever, because:

First. The moving parties present no better claim to the printing than their successful competitor. Both bids were informal in matters of substance.

Second. No bidder in his offer followed the proposals. Every bid, those of others as well as those of the parties interested in this motion, was radically defective.

Third. The state officers, having endeavored to obtain bids in a certain form and failed, were at liberty, as against such faulty bidders, to examine all, and, according to their best judgment, award the contract to the lowest bidder.

Fourth. In *The People ex rel. Belden agt. The Contracting Board* (27 N. Y., 378), the court of appeals have held that when the law required "the canal contracting board to award contracts to 'the lowest bidder who will give adequate security,' and it having made an award, a lower bidder who has given the security required, is not entitled to a mandamus." That decision, whatever may be the opinion of this court as to its

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soundness, must control action. It is a case exactly parallel to the one before us, provided the bid of Weed, Parsons & Co., had been in the form required by the state officers. The principle thereby enunciated would prevent the relief asked, even though the moving parties had fully complied with all requirements. When, however, the movers present no legal right to any relief, the court should not, without hearing the party who holds the contract, make any order affecting it, and to do so it is, probably, powerless.

The case of *The People ex. rel. Vickerman*, agt. *The Contracting Board* (26 *Barbour*, 254) is not in conflict with that of *Belden* just cited. The latter is distinguishable from the former, and was so distinguished in the opinion written in the *Vickerman* matter, by the fact that the contract, which the relator sought in that of *Belden*, had been let to another party. The contract which the present proceeding aims to obtain for Weed, Parsons & Co., has been actually made with *The Argus Company*, and the *Belden* decision is, therefore, exactly applicable.

The motion for a mandamus is denied.

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N. Y. COMMON PLEAS.

JOHN M. BIXBY agt. FRANCIS A. DREXEL and others.

Agents — liability for money received and paid over to principals — Remittance and acceptance by telegram regarded as a payment.

Where, for a long time, agents and their principals had telegraphed and acted upon "exchange accounts," in the absence of fraud and want of notice, the credit and acceptance by telegram of a certain amount in dispute should be regarded as a payment within the spirit and meaning of judicial authority.

Where plaintiff was directed by B. B. & Co., his bankers, to reimburse them by a payment to defendants, their receipt of the money (it being within the scope of their authority) creates no obligation on their part to make restitution after they have, in good faith, accounted for and paid over the proceeds of the collection.

Although an action may be maintained against an agent who has received money, to which his principal has no right, a party must be held to some degree of diligence in charging liability upon such agent. He will not be allowed to wait until the agent has parted with the funds and then claim restitution because there was a running account between him and his principals upon which the amount might have been credited.

*Special Term, February, 1879.**A. R. Dyett, for plaintiff.**Charles Tracy and Charles E. Tracy, for defendants.*

LARREMORE, J. — On October 16, 1872, the firm of Bowles Brothers & Co. of this city issued their letter of credit, No. 5,390, for £2,000 to the plaintiff, who, with his son and agent, Robert F. Bixby, executed a contemporaneous agreement in consideration of such credit facilities to reimburse Messrs. Bowles Brothers & Co. for any and all sums paid by them or

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their agents in good faith under such credit, together with all exchanges, interest and costs, and a commission of one per cent for their benefit therein. They were further authorized to reimburse themselves for all such sums and charges by their draft upon cash in account to be deposited from time to time by Robert F. Bixby, of New York. On November 4, 1872, plaintiff being then in Paris, drew his bill of exchange to the order of James W. Tucker & Co. for the sum of £100, directing the firm of Bowles Brothers & Co., in London, to pay said amount three days after sight and charge the same to the account of letter of credit No. 5,390. The bill for value paid was delivered by plaintiff to the payees thereof, who indorsed the same to the firm of Clews, Habicht & Co., by whom it was presented to the drawees thereof, who, on November 5, 1872, accepted the same, payable at the Union Bank of London.

When the bill matured it was duly presented for payment and was duly protested for non-payment, the acceptors thereof being then insolvent. No part of the bill has since been paid by the drawees, or by any one, in their behalf. Notice of said non-payment and protest was given to plaintiff, who, thereupon, on or about November 20, 1872, paid to James W. Tucker & Co., by their agents in New York, the amount thereof, interest and notary's fees — in all \$565.32.

Meanwhile, and on November 16, 1872, the said drawees applied to Robert F. Bixby, plaintiff's agent in New York, by a written order, signed by them, and represented to said agent that the bill of exchange had been paid and requested repayment of the amount thereof through the agency of the defendants, the bankers of said drawees in New York, which repayment was made by plaintiff's agent without knowledge of the fact of non-payment and protest of the bill of exchange. It is claimed by the defendants that while the written order for repayment was on its passage, the firm of Bowles Brothers & Co., for a valuable consideration, assigned the same to a certain firm of J. S. Morgan & Co., of London, which last-

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named firm constituted the defendants their agent at the city of New York to receive and collect the same, and that, in pursuance of such authority and without knowledge of the non-payment of the bill of exchange, the defendant's immediately, and on the same day of the repayment thereof by plaintiff's agent remitted and paid over the proceeds thereof to the firm of J. S. Morgan & Co.

After the plaintiff had discovered such repayment by his agent, and before, as he claims, the defendants had parted with the possession of the proceeds, or parted with any thing of value upon the faith of the written order for repayment, he (plaintiff) notified defendants of the dishonor of the bill of exchange, and demanded a return of the said sum of \$565.32, paid by his agent under the alleged misapprehension and mistake. This the defendant refused to do, and plaintiff sues for the recovery of the amount thus paid.

The testimony discloses no proof of bad faith on the part of the defendants. They acted as the agents of J. S. Morgan & Co. in the repayment of plaintiff's draft. The bill of account or order of repayment of November 16, 1872, fixed no personal liability upon them. It was not proved that they had knowledge of the dishonor of the draft, at the time they cabled their principals of its repayment in New York. There was no consideration on their part that created any liability to the plaintiff. They collected and remitted by cable, November 20, 1872, the sum paid by plaintiff's agent on the day of its payment. It was not until between December 2 and 19, 1872, that he demanded a return of the money as paid by mistake. When interrogated as to the transmission of the credit on his payment of the draft, he, while denying notice of such transmission, testifies: "I have an indistinct recollection something was said about it" (*Stenographer's min.*, p. 18). His answer to the following questions are significant:

Q. When you paid that money to Drexel, Morgan & Co. did you have information that the bill of exchange had not been paid, or any suspicion of it? A. I think not.

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Q. Did you know that the draft had not been paid until you received a letter from your father or Mr. Tucker? A. I did.

And yet, in the face of this fact, he paid the amount. He further testified that he had an impression, but was not positive, that he made a demand upon defendants to refund prior to December 18, 1872 (*stenog. min.*, p. 27), but could not swear to it positively (*Minutes*, p. 28).

Contrast with this testimony of Mr. Morgan, which shows satisfactorily that the sum paid by plaintiff's agent was remitted to J. S. Morgan & Co. within a day or two after it was paid (*minutes*, p. 32) by cable transfer, which action was ratified by that firm by letters of November 23 and November 27, 1872. It appeared that this draft was included in the special exchange account between the defendants and their London house, and did not enter into the general collection accounts between the same parties. The failure of the Bowles Brothers & Co. was announced November 9, 1872, and the repayment was not made until eleven days thereafter, November 20, 1872, within which time no notice of the dishonor of plaintiff's bill of exchange was brought to defendants' knowledge. According to the testimony the acceptance of Bowles Brothers & Co. was considered and treated as a payment.

As against the telegraphic remittance, which was actually sold to third parties, defendants have no reclamation against their principals. The special exchange account showed a balance struck and settlement made which the plaintiff a month afterward sought to impeach. But I cannot disregard the means which scientific discovery has established for the facility of business transactions. For a long time the defendants and their principals had telegraphed and acted upon exchange accounts, and in the absence of fraud and want of notice, the credit and acceptance by telegram of the amount in dispute should be regarded as a payment within the spirit and meaning of judicial authority (*Story on Agency*, sec. 300; *Hearsary agt. Pruyn*, 7 *John.*, 182; *Lafarge agt. Kneeland*,

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7 *Cow.*, 460; *Frye* agt. *Lockwood*, *id.*, 456; *Mottatt* agt. *McLelan*, 1 *Wend.*, 173; *Colvin* agt. *Holbrook*, 2 *Coms.*, 129; *Langley* agt. *Warner*, 3 *N. Y.*, 327; *Mayer* agt. *The Mayor, &c.*, 63 *id.*, 457).

It was urged by plaintiff's counsel that the defendants should have disclosed their agency, and that for their omission in this respect they are personally liable. The principle upon which such a liability exists is not supported by the evidence in this case. They are not shown to have been guilty of fraud, collusion or any wrongful act. They simply received a voluntary payment of money which they at once, in accordance with an established and recognized usage, transmitted to their principals.

In the *Canal Bank* agt. *Bank of Albany* (1 *Hill*, 287) the money was obtained on a forged indorsement, and the defendant's liability was placed upon the ground that no title passed. To the same effect is *Holt* agt. *Ross* (54 *N. Y.*, 472). *Mills* agt. *Hunt* (20 *Wend.*, 432) is not in point. That was the case of an auctioneer's selling property at public auction without disclosing his agency. In *Hochster* agt. *Baruch* (5 *Daly*, 440) the agent had exceeded his authority, and moreover, he had contracted as principal. I find nothing in *Taintor* agt. *Prendergast* (3 *Hill*, 72), *Cox* agt. *Prentice* (15 *Maule & Selwyn*, 344), *Buller* agt. *Harrison* (2 *Cowper*, 565), *Langley* agt. *Warner* (3 *N. Y.*, 330) that disturbs my confidence in the conclusion I have reached. If the doctrine of agency were applicable in this case, the defendants on the authority of *Langley* agt. *Warner* (*supra*), are entirely absolved from responsibility. Their principals had a perfect right to the money when it was received, and there is no pretense that until at least eleven days after such payment they had any notice of the mistake (for such it obviously was) in the remittance of the money. But I incline to the view that, as between these parties, the question of agency is not in this case. Plaintiff was directed by Bowles Bros. & Co., his bankers, to reimburse them by a payment to defendants. Their

Bixby agt. Drexel.

receipt of the money (which was within the scope of their authority) created no obligation on their part to make restitution after they had in good faith accounted for and paid over the proceeds of the collection. Plaintiff must be held to some degree of diligence in charging liability upon the defendants. He did nothing until they had parted with the funds, and then claimed restitution because there was a running account between the defendants and their principals, upon which the amount in dispute might be credited.

I cannot recognize the justice of such a claim. The testimony is undisputed that the telegraphic "exchange account" was intended and understood to be an actual payment of the amount transmitted by cable. For this reason there should be judgment in favor of the defendants, for a dismissal of the complaint, with costs.

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N. Y. SUPREME COURT.

DIEGO DE CASTRO and another agt. JAMES E. BRETT and others.

Arbitrators — power of supreme court over awards — when and when not set aside — what party alleging error must prove.

Where a vessel, by the terms of the charter, was to proceed first to S. M., then to S. and lastly to C., the omission to go to S. before proceeding to C. was a deviation from the contract for which the defendants would be liable to respond to the plaintiffs in case damage resulted therefrom. Such deviation could, however, be excused by defendants showing that it was the result of a stress of weather, or of causes over which they had no control, and was not the result of carelessness, or neglect or want of skill on the part of the captain of the vessel.

The burden of proof, in making out such excuse, is upon the defendants. An award of arbitrators should not be set aside where the plaintiffs, with full knowledge of the situation and of the action of the arbitrators, accepted the fruits of, and executed, the award.

The supreme court has no general supervisory power over awards of arbitrators, and where the arbitrators keep within their jurisdiction their awards, in the absence of corruption or misconduct, will not be set aside for error of judgment either in law or in fact.

Awards may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures, or for an error of law appearing on the face of the award, *i. e.*, where it appears that the arbitrators intended to decide according to law, but through mistake as to the law did not.

The party alleging error, in order to sustain his action, must be able to show, from the award itself, that but for the mistake the award would have been different.

Although the arbitrators may have misunderstood the effect of their award, yet where the evidence does not justify the conclusion that they were actuated by any other purpose than that of doing justice between the parties, or that they were guilty of corruption or misconduct in making the award, the award will not be vacated.

Special Term, September, 1878.

De Castro agt. Brett.

William M. Hoes and Samuel Jones, for plaintiffs.

E. H. Hobbs, for defendants.

LAWRENCE, J.—The vessel, by the terms of the charter, was to proceed first to Santa Martha, then to Savanilla, and lastly to Carthagena.

Prima facie the omission to go to Savanilla, before proceeding to Carthagena was a deviation from the contract, for which the defendants would be liable to respond to the plaintiffs in case damage resulted therefrom.

Such deviation could, however, be excused by the defendants showing that it was the result of a stress of weather or of causes over which they had no control, and was not the result of carelessness or neglect or want of skill on the part of the captain of the vessel.

The burden of proof in making out this excuse would be, in any case, upon the defendants. It is conceded that the plaintiffs and defendants agreed to submit their matters of difference to arbitration, that such arbitration was had, that an award was made, and that on the 14th of March, 1874, the day after the award was made, it was acted on by the plaintiffs paying the balance due under the charter, and receiving from the defendants the amount found due for short delivery of cargo. Unless the award can be set aside, the plaintiffs are estopped from claiming any of the damages which they allege they sustained by the failure of the vessel to proceed to Savanilla from Santa Martha.

It is contended by the plaintiffs that the award was not valid and binding for the reason that before the making of the award, the defendants having submitted to the arbitrators an affidavit of the captain of the vessel in which the captain declared and certified that on his arrival at Carthagena he did, in due form, make due protest before the United States consul at that port setting forth the reasons for his not having proceeded first to the port of Savanilla, asked and claimed to

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be allowed to contradict such affidavit by procuring documentary evidence from Santa Martha, Savanilla and Carthagena, and that before the matter was finally closed and decided plaintiffs should be allowed to communicate with their correspondents at those places.

Also, that the defendants agreed to allow the plaintiffs to submit such documentary evidence as plaintiffs could obtain to contradict said statements, entries and affidavits, and said arbitrators agreed to receive and consider the same.

The plaintiffs also allege that in the latter part of February or early part of March, 1874, at the time of the hearing before the arbitrators, when the vessel was loaded and about to proceed upon another voyage and defendants were desirous that her departure should not be delayed, the defendant G. A. Brett, in the presence of said arbitrators, promised that if the vessel was allowed to depart if there was any thing wrong in the statement of the captain or his affidavit, or the log-book and the same could be proven to be incorrect he would make it all right, and would make good any loss which the plaintiffs had sustained.

On the 14th of March, 1874, the arbitrators made their award as follows :

“ The matter of the charter-party of the brig Nellie Antrim, which was left to us for arbitration, has been decided as follows : The vessel is entitled to the whole amount of charter and six days' demurrage, less amount paid in foreign ports and New York.

“ We find vessel is responsible for one bag of coffee and one hide ; also for cargo short delivered in foreign ports — M. B. B., one box types and one box of flour, and to account for which interests are ascertained ; N. D., one box, either soap or tobacco ; G. G., one box, contents unknown.

“ No claim on either side for the pilotage half paid, nor that the charterers have any claim for damages by reason of the vessel having first gone to Carthagena in place of Savanilla. The log-book shows that it was occasioned by stress of weather,

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and the affidavit of the captain that a protest was made to that effect in Carthagena corroborates it.

"NEW YORK, *March* 13, 1874.

"A. J. DOVALLE.

"J. E. MILLER."

The questions now presented for my consideration are :

First. Should the award be set aside ?

Second. If the award is set aside, has the deviation been excused ?

Third. And if the deviation has not been excused, have the plaintiffs sustained any damage therefrom for which the defendants should respond to them ?

As to the first question, after giving to the evidence the fullest and most careful consideration, I am compelled to return a negative answer :

First. On the ground that the plaintiffs, with full knowledge of the situation and of the action of the arbitrators, accepted the award and executed it. The conduct of the plaintiffs seems to me to have been entirely inconsistent with the belief that the award was, in any event, to be a nullity.

Second. In *Fudickar* agt. *The Guardian Mutual Insurance Company* (62 N. Y., 392) the court of appeals held that the supreme court has no general supervisory power over awards of arbitrators, and that where the arbitrators keep within their jurisdiction their awards, in the absence of corruption or misconduct, will not be set aside for errors of judgment either in law or fact ; that awards may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures, or for an error of law appearing on the face of their awards, *i. e.*, where it appears that the arbitrators intended to decide according to law, but through mistake as to the law did not.

It was further held that the party alleging error in order to sustain his action must be able to show from the award itself that but for the mistake the award would have been different

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(See, also, *The Morris Run Coal Co. agt. The Salt Co. of Onondaga*, 58 N. Y., 667; *Hodgkinson agt. Fernie*, 3 Common Bench [N. S.], 189; *Perkins agt. Giles*, 50 N. Y., 229). In this case there is no evidence which shows that the arbitrators were guilty of corruption or misconduct in making the award.

The arbitrators may have misunderstood the effect of the award, but the evidence does not justify the conclusion that they were actuated by any other purpose than that of doing justice between the parties. Nor is there in this case any palpable mistake of fact, in the nature of a clerical error, which will bring it within the rules laid down in *Fudickar agt. The Guardian Mutual Insurance Co. (supra)*. Again, in the face of the award itself I am not prepared to say that it is apparent that but for the affidavit of the captain as to the protest the award would have been different.

The award does, it is true, recite that the log-book shows that the failure of the vessel to go to Savanilla before proceeding to Carthagena was occasioned by stress of weather, and the affidavit of the captain that "a protest was made to that effect corroborates it." Whether the arbitrators would have rejected the statement in the log-book as entirely unworthy of belief, without the corroborative affidavit of the captain, certainly does not appear in the award itself.

It may be said, however, that taken in connection with the testimony of Mr. Dovalle, the arbitrator, and of Mr. Scott, that it is clear that but for the affidavit of the captain the award would have been different and that the arbitrators would have found that the deviation was not excused. The conduct of the arbitrators in immediately proceeding to make an award while they had agreed, as the plaintiffs contend, to give the latter time to prove the falsity of the captain's affidavit, and that the award should be a nullity if such proof should be produced, does not seem to show that they regarded their work at that time as a nullity. Their subsequent attempt to reopen the case in June, 1874, can have no bearing upon the

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proper disposition of this question, because at that time if the award, when made, was a finality the arbitrators were *functus officio*.

For these reasons it seems to me that the plaintiffs have failed to make out a case entitling them to a judgment vacating the award (*See cases, supra*).

If my conclusions are, however, erroneous in respect to the plaintiffs having failed to make out a case entitling them to a judgment vacating the award for the reasons claimed by them there is another ground on which I think they must fail, and that is that on the testimony the defendants appear to me to have excused the deviation. The testimony of the captain confirms the statement of the log-book kept by the mate as to the cause of the inability of the vessel to reach the port of Savanilla, and shows that it resulted from the action of the current of the wind and of the bursting of the sails.

This testimony is not overthrown by that of the expert produced by the plaintiffs, nor by the suggestion of plaintiffs' counsel, that the deviation was due to another cause.

Unless, therefore, the testimony of the captain is to be disregarded as utterly unworthy of belief, his statement as to the cause of his failure to make the port of Savanilla must control me in arriving at a judgment on this branch of the case.

It is, in substance, contended by the plaintiffs that the testimony given by the captain must be discredited because in his affidavit filed with the arbitrators he made a false statement in regard to the protest, and in support of this view attention is called to the alleged discrepancy between the captain's statement in his *de bene esse* examination and in his evidence upon the trial.

An examination of the testimony of the captain does not lead me to the conclusion that such discrepancies as are alleged to exist in his statements should discredit him as a witness. In his *de bene esse* examination the witness testifies: "As soon as I came there, the first day I came up to Mr. Hamaberg, I asked for his advice; he told me to wait and he would see

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what he could do for me; on the twenty-third of December he told me to discharge my cargo belonging to Carthagena; that day I noted a protest, a blank protest; it was printed in the consul's office."

Q. Was there anybody present? A. No, sir, except me and the consul, and he told me Mr. Matthieu, his partner, was sick and he could not attend to me and he would see me all right.

Q. Was it upon a piece of paper? A. No, sir, in a book; if I saw the book again I would know it.

Q. Describe the book. A. It was about an inch and a half thick; I can't tell how long it was; about fourteen inches long.

Q. How wide? A. About ten inches wide.

Q. Who presented the book to you? A. Mr. Hamaberg, the consul.

Q. Where did he get it from? A. He took it out of his office.

Q. Was this in his office? A. Yes, sir; Mr. Matthieu and Mr. Hamaberg's office was one; they were partners.

Q. Did he get the book? A. He did; it belonged to the office; then he told me to bring my log-book, in case I wanted my protest extended.

Q. Did you acknowledge it — did he swear you? A. No, sir; he didn't.

Q. What did you do? A. I signed it.

Q. In his presence? A. Yes, sir.

Q. Do you know what the protest related to? A. To the dangers of the sea and the navigation; it is a blank protest, made out generally.

In his examination at the trial, the witness stated that he noted a protest but did not extend it, and that the protest was not extended because his consignee did not require him to do it. In his affidavit before the arbitrator, he certified and declared that, "on my arrival at Carthagena, I did, in due form, make protest before the United States consul at

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that port, setting forth the reasons and causes for my not having proceeded to the port of Savanilla, before proceeding to the port of Carthagena."

The testimony on the part of the plaintiffs is to the effect that no record of a protest can be found in the consul's office at Carthagena. The consul Mr. Hamaberg, referred to by the captain, is dead. The testimony of the captain on the two different examinations does not appear to me to be willfully contradictory. Looked at in one view, he did duly make a protest to the consul, who was also the consignee of the vessel, and I do not think that, in weighing his evidence for the purpose of determining whether he is worthy of belief in other respects, great stress should be laid upon the fact that in his affidavit he declares that in due form he did protest, while in his evidence he states that he noted a protest.

Furthermore, I regard the question as to whether a protest was or was not made as one which bears, in this case, solely upon the credibility of the captain's evidence.

Even if he did not protest, he would not be precluded from showing that the alleged deviation was caused by stress of weather or by the dangers of the sea; and although the protest, if made, might be evidence against him or his owners, it would not, in general, be evidence in his or their favor (*Abbott on Shipping*, 465, 466; 2 *Parsons on Mar. Law*, p. 489 and cases in note 3).

I cannot, therefore, reject the testimony of the captain as unworthy of belief because of the alleged discrepancies in regard to the matter of the protest; and as his testimony, relative to the cause of the vessel not reaching Savanilla, corroborates the log-book, and as he is not otherwise impeached, I think that his testimony in that respect should be accepted as true.

Accepting it as true, the defendants have excused the deviation, and it therefore follows that the plaintiff can have no cause of action against the defendants by reason thereof.

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I am of the opinion, therefore, that the defendants are entitled to judgment.

First. Because the plaintiffs, with full knowledge of the situation, accepted the fruits of, and executed, the award.

Second. Because they have failed to make out a case which calls for the vacating of the award under the decisions I have referred to.

Third. Because, even if the award were vacated and set aside, the evidence shows that the alleged deviation from which the plaintiffs claim to have suffered damage arose from stress of weather and the action of the wind and of the current, and not from any want of care or skill or from the neglect of the captain of the vessel.

The findings will be settled on five days' notice.

Phenix Insurance Co. agt. Church.

N. Y. COMMON PLEAS.

THE PHENIX INSURANCE COMPANY, plaintiff and appellant,
agt. SIMEON E. CHURCH, defendant and respondent.

Promissory note — Bona fide holder.

Where a plaintiff receives from the payee or holder thereof a diverted note in payment of a precedent debt and in consideration thereof alters his position by surrendering some security or evidence of indebtedness, he becomes a *bona fide* holder for value of the note received so as to shut out defenses thereto which otherwise might have been made. The reasons stated. So held, upon a reargument of the appeal herein and the present decision, in effect, reverses that previously rendered in the same case, reported, *ante*, page 29.

General Term, January, 1879.

BROWN, POPE & Co., were insurance brokers, in Boston, and had collected a considerable amount of money consisting of premiums of insurance belonging to the plaintiff and upon being pressed for payment, they gave their check for the amount. This check, upon being presented to the bank for payment, was not paid. Brown, Pope & Co., being pressed for the payment of the check thus given, finally gave the note in suit to the plaintiffs alleging it to be a good note and the unpaid check was surrendered to them. The note in suit had been given to one Worcester, for a particular purpose, and Worcester had diverted it and loaned it to Brown, Pope & Co., without receiving any consideration therefor.

The question presented is, are the plaintiffs such holders of the note in suit as would prevent the defendant from setting up the defense in this action upon the note which he had

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against the note in the hands of Brown, Pope & Co., and in those of Worcester?

Mr. justice McADAM, who tried the cause, thought that the plaintiffs were *bona fide* holders of the note for value. The general term of the marine court reversed this judgment and from this judgment of the general term this appeal is taken.

Mr. C. Tillotson, of counsel, for plaintiff and appellant.

Mr. S. E. Church, in person.

VAN BRUNT, J. — A large number of cases have been cited by the counsel for the respective parties and which it is not at all necessary that I should notice in detail, because the principle which all these cases serve to illustrate seems to be the same, and it is only in the application of this principle to the facts of this case that any difficulty can arise.

In the case of *Moore agt. Ryder* (65 N. Y., 438) the rule is stated to be as follows: "In case the holder of such paper has not parted with any value or received any binding obligation, or changed his position to his detriment in the faith thereof, he cannot recover against the party defrauded or wronged."

Again, in the case of *Turner agt. Treadway* (53 N. Y., 650), somewhat different language is used in stating the proposition but it is of the same purport. It is there stated that a recovery cannot be had upon a note which has been diverted unless the plaintiff, upon the strength of the note, has surrendered some security or evidence of indebtedness, or parted with some value. It is true that it may be said that in the last case it was not necessary to determine whether the surrender of such an evidence of indebtedness as the past due note or check given for a debt of the maker would constitute the holder of diverted paper a holder for value, but the proposition contained in the previous case is only restated in different language. Applying this rule, even if there were no adjudicated cases upon the point, I think that it could be

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shown that the plaintiffs in this action had changed their position to their detriment by the surrender of the check to Brown, Pope & Co. at the time they received the note in suit. It is impossible for any person to say that the holder of a negotiable instrument is not in a much better position than if the demand which this instrument represents had remained in an open unliquidated account. In the one case he holds an acknowledgment of indebtedness which would require the most satisfactory evidence to overthrow; in the other the burden of proof would be upon him to establish his claims, a difference which, in very many cases, would completely reverse the results of a litigation. So, in the case at bar, the plaintiffs in bringing their action upon the check of Brown, Pope & Co. would be proceeding upon an admission by Brown, Pope & Co. of their indebtedness which it would require very strong evidence to overthrow; whereas if they were suing upon an open account they would have to prove every item of the account which, it might be, they would find it impossible to do, and they would lose all the presumptions in their favor which they could avail themselves of in a proceeding upon the check.

Therefore, it seems to me to be no answer to the point that the plaintiffs have changed their positions to their detriment by the surrender of the check to Brown, Pope & Co., to say that even after the surrender of the check they could have brought an action against Brown, Pope & Co., upon the account.

But I need not rely upon my own application of the principle because the only authorities upon this question are entirely in harmony with the foregoing views and entirely dispose of the question. In the case of *Younge agt. Lee* (18 Barb., 187) the fact was expressly adverted to that the holder of a demand in negotiable paper was in a better position, on many accounts, than if the demand had remained in an open, unliquidated account and the decision of the case was based upon this ground.

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The same case was affirmed in the court of appeals (12 *N. Y.*, 551), and the ground upon which the case in the court below was decided is not dissented from, but the decision is made to turn upon the fact that the note given up was not yet due and because the note surrendered was not yet due it was held that the plaintiffs were holders of the note sued upon for value. It is difficult to see what difference the fact that the paper surrendered is or is not due, can make and in the case of *Day agt. Saunders* (1 *Abb. Court of Appeals* 495), it was expressly held that it was manifest that there is no distinction in principle between a case where the debt is due and when not due.

In the report of the case of *Brown agt. Leavitt* (31 *N. Y.*, 113) it does not appear whether the surrendered note had been given for a previous indebtedness or whether the note constituted the whole debt but it is evident, from the opinion of the court, that whatever the fact was it could be of no consequence in the disposition of the case and that the holder of a promissory note transferred in payment of a note already due, is a holder for value.

In the case of *Pratt agt. Cowan* (37 *N. Y.*, 440) the facts were that one Agnew being indebted to the plaintiff in a large sum of money, for which the plaintiff held Agnew's overdue notes, the plaintiff gave up to Agnew such overdue notes and received, therefor, the note in suit and new notes made by Agnew for the balance, and that the plaintiff took the note in suit without notice of any defense.

The referee found that the said notes so due from Agnew to the plaintiff were surrendered by the plaintiff to Agnew, and this note of defendants with Agnew's indorsement was delivered by Agnew to plaintiff on account of so much, and as a part, of said indebtedness, and the note, or notes, of Agnew given for the balance. That no agreement was made at the time that said note in suit should be a payment of so much, or any part, of said indebtedness, nor was any thing said on the subject, the transaction being simply a surrender

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of the old notes and the indorsement over of this and the giving of the other notes, "and the court expressly held that these facts constituted the plaintiffs holders for value and base their decision upon the cases of *Young agt. Lee* and *Brown agt. Leavitt*.

It is true that the court had another reason for arriving at the same conclusion which has been disapproved of in the cases of *Moore agt. Ryder* (65 N. Y., 442); but the first ground upon which the decision had been placed is in harmony with the decisions and has never been overruled. It is suggested that a check is not such a security as a promissory note, but I am unable to see any difference between a past due check and a past due bill of exchange or promissory note. I am of the opinion, therefore, that by the surrender of the check of Brown, Pope & Co. at the time of the receipt of the note in suit the plaintiffs have changed their position in respect to their claims upon Brown, Pope & Co. to their detriment, and, consequently, are holders of the note in suit for value.

The judgment of the general term of the marine court should be reversed and that of the trial term affirmed, with costs.

I concur. CHARLES P. DALY, Ch. J.

I dissent, for reasons given in former opinion (*ante*, p. 29).
LARREMORE, J.

Fellows agt. Kittredge *et al.*

N. Y. MARINE COURT.

CAROLINE S. FELLOWS agt. WILLIAM P. KITTREDGE *et al.*

Discharge of a judgment against a bankrupt — Code of Civil Procedure, section 1268 — construction of.

The right of judgment debtors discharged from their debts by proceedings in bankruptcy to have a judgment against them, canceled of record after the lapse of two years since their discharge was granted, sustained notwithstanding the fact that the judgment was a lien upon certain real estate conveyed by the bankrupts. The reasons stated.

Special Term, March, 1879.

THE plaintiff recovered judgment against the defendants December 31, 1874, for \$525.86, and on the 5th day of July, 1876, the defendants were discharged from their debts and liabilities, by and under proceedings in bankruptcy, which resulted in such discharge on that day. The defendants now apply, under section 1268 of the Code of Civil Procedure, for an order discharging the judgment of record. The plaintiff opposes the motion on the ground that the judgment which was duly docketed in Kings county is a lien upon two pieces of land therein situated, one of which was conveyed by the defendants after the docketing of the judgment and before their adjudication as bankrupts, and the other was conveyed by deed recorded since their discharge; and the plaintiff insists that the application should be denied, because if it is granted it will destroy her judgment lien on said property.

Thomas D. Robinson, for motion.

J. F. Kernockan, opposed.

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McADAM, J. — A judgment is not a specific lien on any particular real estate of the judgment debtor but a general lien upon all his real estate (*Rodgers agt. Bonner*, 45 N. Y., 379). In short, a judgment creditor has no *jus in re* but a mere naked power to make his general lien effectual by following up the steps of the law and consummating his judgment by execution and levy on the land (*See Conrad agt. Insurance Co.*, 1 *Peters*, 387, 443). The new Code (*sec.* 1268) allows the judgment creditor two years after the bankrupt's discharge to make his general lien effective; and whether he improves the opportunity or not it operates as a sort of statute of limitation and allows the bankrupt, after the two years have elapsed, to apply, upon proof of his discharge, to the court in which the judgment was recovered for an order directing it to be discharged of record; and if, upon the hearing of the motion, it is made to appear that the bankrupt has been discharged from the payment of the judgment, the Code (*sec.* 1268) is mandatory "that an order must be made" granting the application. The defendants have supplied the necessary proofs and are, therefore, entitled to the relief they ask (*See Deyo agt. Van Valkenburgh*, 5 *Hill*, 242). The lien of a judgment recovered in a state court is regulated by the state law which creates and regulates the nature, duration, effect and mode of discharge of such lien which, when declared, cannot be restrained or extended by the court. There is nothing in the statute which authorizes a partial or conditional discharge of the judgment, or which authorizes the court, by decree or otherwise, to preserve and continue the lien of the judgment creditors upon any specific property, real or personal. The defendants are, by force of the statute, entitled to an unconditional order discharging the judgment and their motion, therefore, will be granted.

Albany City Savings Bank agt. Martin.

SUPREME COURT.

ALBANY CITY SAVINGS BANK agt. GEORGE MARTIN, CHAUNCEY
S. TITUS and others.

*Deed — Covenant to pay mortgage — Insufficient evidence of the insertion of
covenant in deed through fraud or mistake.*

Parties who have accepted a deed after having had ample opportunity to examine the same before its acceptance, and also upon action being brought to enforce a covenant in such deed before it was placed on record, are not in a position which entitles them to say that it is not in conformity with their agreement of purchase.

Where the covenant in the deed sustains the action it should not be changed or altered, or adjudged incapable of enforcement on the ground of fraud or mistake, without a trial in which the grantor may be heard. A deed formally accepted and put on record, and containing in clear and legibly written words the assumption clause or covenants ought to be enforced, is very high evidence of the agreement between the parties at the time of the purchase, and should not be lightly disregarded, nor set aside except upon clear and convincing proof.

The evidence in this case examined, commented on and *held* to be insufficient to maintain the defense, that the covenant in the deed to assume payment of the mortgage, was contrary to the agreement of purchase and was inserted therein by fraud or mistake without the knowledge of the grantees.

Albany Circuit, May, 1878.

Parker & Countryman, for plaintiffs.

A. H. Tremaine, Clute and Hinman, for defendants Titus and Stott.

WESTBROOK, J. — This action is brought to foreclose a mortgage executed by George Martin and wife to plaintiff, dated

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June 15, 1874, and given to secure the sum of \$2,500 loaned to Martin by said plaintiff.

On the 26th of February, 1875, Martin and wife conveyed the premises covered by the mortgage to the defendants William Stott and Chauncey S. Titus for the consideration, as expressed in the deed, of \$5,000, which deed contains the following clause: "Said premises are conveyed subject to a bond and mortgage on the above-described premises for \$2,500 given by George Martin and wife to Albany City Savings Institution, and which bond and mortgage said parties of the second part assume and agree to pay." The deed was recorded in the Albany county clerk's office on the 27th day of February, 1875, in Book of Deeds No. 278, on page 398. The plaintiff seeks to enforce the covenant, the words of which have been given, against the defendants Stott and Titus, and asks, if there be a deficiency upon the sale, for a judgment against them for the amount thereof. They defend upon the ground that the above stipulation in the deed to them was contrary to their agreement of purchase from Martin, and was inserted in the deed by fraud or mistake without their knowledge, and their discovery that it was in was not made until a long while after the deed was recorded. Whether the defendants Stott and Titus are personally liable for any deficiency is the only question which this case presents.

Apart from the questions of fact, which the defense involves, and which will be hereafter considered, there are two legal difficulties, which are these: First. Indisputably the deed under which the defendants took the property, contains the covenant upon which they are sought to be made liable. Can that deed be changed or altered, or be considered or regarded in any form other than as it reads, until it has been reformed in an action brought by these defendants against George Martin, their grantor? Second. Are the defendants, as they admit they have had ample opportunity to examine the deed before it was accepted, and also before it was placed on record, in any position which entitles them to

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say that it is not in conformity with their agreement? In regard to the first objection, it can be plausibly at least urged, that the written agreement between the defendants and Martin sustains the action. How can that be changed or altered, or adjudged incapable of enforcement on the ground of fraud or mistake, without a trial with Martin? It does not answer the objection to say the plaintiff cannot recover without an agreement by the defendants to pay, because the answer is they have made one by their deed. That covenant must be nullified to have the defense succeed, and can that be done without hearing Martin? He is interested, and interested now in its enforcement; because if this action fails, the court invalidates his agreement without hearing him. In regard to the second point, is it tolerable that a party, who has taken a deed deliberately, who can read and understand (one of the defendants was educated as a lawyer, and the other is one accustomed to deal in real estate), and has abundant opportunity so to do, can be heard to say, "I have never promised, as the writing evinces." Certain it is, if a person is able, by his own testimony, under such circumstances, to prove a fraud or mistake, the establishment of a rule which enables him so to do, will lead to infinitely more fraud than will be thereby suppressed in some exceptional cases. Waiving, however, the discussion of these legal questions, let us look at the evidence.

Mr. Titus and Martin claim that the assumption of the mortgage was no part of this agreement with Martin; that Stott had gone, about 11 o'clock A. M. of the day the deed was delivered, to the office of the Messrs. Parker to examine the conveyance, and on such examination found there was no clause then in the deed as it now contains; that when the deed was delivered by Mr. Walsh (then a clerk in office of Messrs. Parker) and Mr. Martin, it, and others delivered at same time, were only examined so far as to see the numbers of the lots were right, and the same was put on record without further examination.

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Opposed to this evidence of the defendant is :

First. The deed itself, formally accepted and put on record, and containing, in clear and legibly written words, the covenant relied upon. This is very high evidence certainly of the agreement, and should not be lightly disregarded nor set aside except upon clear and convincing proof (*Nevins* agt. *Dunlap*, 33 *N. Y.*, 680 ; *Pennell* agt. *Wilson*, 2 *Robts.*, 509 ; *Lyman* agt. *U. S. Ins. Co.*, 17 *Johns.*, 376).

Second. John W. Walsh, formerly a clerk in the office of Messrs. Parker, and Amasa J. Parker, Jr., testified that some months before the execution of the deed to the defendants, a large number of conveyances for different pieces of property owned by George Martin and located in the neighborhood of Martinsville, were prepared, the consideration and grantee's name in blank, and each deed contained the clause assuming the mortgage owned by the savings bank, and of those deeds this was one. Against the clear evidence, then, of these witnesses, is only the evidence of the defendant Stott, that at 11 o'clock on the morning of the day of the delivery of the deed, it did not contain the assumption clause. Contradicted as Stott is by two witnesses upon this point, and by the further fact of the gross improbability that gentlemen of the character and standing of the Messrs. Parker and their clerk would have inserted the assumption clause after examination, Mr. Stott's statement cannot be believed.

Third. Walsh and Martin prove that this deed and several others were left with Titus, at his office, about 12 o'clock. They then went to a hotel and got dinner, leaving the deeds. On their return, which was in about half an hour (Stott was then in the office of Titus), considerable conversation took place between Titus and Stott, the latter opening and reading the deeds. This interview lasted from a quarter to 1 to 2 o'clock. For the space of two hours, then, the defendants had the deeds for examination, and they did examine them. As this evidence is more natural and reasonable than the evidence of Stott and Titus, it is accepted as true.

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Fourth. Several pieces of property conveyed at same time to defendants by Martin, and containing a similar covenant, have all been conveyed to others by various and separate deeds containing the same covenant on the part of their several grantees. Some of these deeds were prepared in the office of the defendant Titus and copied by a clerk who admits that he could not, without instructions, have altered and changed the language of the covenant, as it is in several instances, without directions and a form. It is impossible to believe the defendants were ignorant of the contents of the conveyances they gave as well as of those received.

Without any further discussion of the questions of fact which this case involves I think the clear weight of evidence is that the defendants accepted the deed with full knowledge, and that the plaintiff is entitled to judgment.

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SUPREME COURT.

BENJAMIN GOULD agt. THE CAYUGA COUNTY NATIONAL BANK
and NELSON BEARDSLEY.

Release — when and when not a bar to an action — when obtained by false and fraudulent representations no bar — When knowledge by one officer of a bank that representations are false binds the bank — Evidence of fraud in a release competent — Where no consideration is paid for release nothing is required to be returned before bringing action to set aside

Evidence that a release of a cause of action was obtained by false and fraudulent representations is competent.

Knowledge by one officer of a bank that such representations were false binds the bank, though such officer represents to the bank that such representations are true.

Where no consideration is paid by a party for a release of a cause of action, it is no defense to an action to set aside such release that the party bringing the action has not returned, or offered to return, the property received under the settlement.

On the facts stated: *Held*, that the officers of the bank had the means of ascertaining whether plaintiffs' bonds had been replaced. The vault was under their control, and it was the proper place to deposit the bonds if they had been returned.

That S., having told the president and other officers that he had returned the bonds, and such statement being false, does not excuse the bank from liability on a claim of an outside party.

The bank cannot escape the consequences of a false representation made to a person dealing with it, and who, by relying on it is injured, by proving that its officers, or some of them, were told the falsehood by some other agent or officer of the corporation.

The party has the right to rely upon the representation as being matter within the personal knowledge of the person making it, unless the source from which the information was obtained was disclosed to him before he entered into the contract.

Plaintiff had the right to assume that the person making the representation as to the return of his bonds had personal knowledge of the fact;

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and especially had he the right to assume they were not making it upon the faith alone of the cashier, S. It cannot be doubted but that the representations influenced plaintiff.

The fact that plaintiff made no offer to return the property and value received under the release, before this action was commenced, does not affect his rights if, as it is claimed, the defendant paid nothing under the settlement.

Fourth Department, General Term, October, 1877.

IN June, 1865, the plaintiff had, in the vault of the Cayuga County National Bank, \$55,000 of government bonds, left there for safekeeping; they were in a paper package, sealed with sealing-wax, and marked with plaintiff's name.

The directors of the bank, organized under the state laws, desired to transform it into a national bank, to do which the laws of the United States required a deposit of national bonds with the comptroller of the currency; the bank did not have bonds to the amount required, and in order to make up the amount, borrowed of persons in the vicinity enough to make up the amount required.

On the 14th June, 1865, the defendant, Beardsley, president of the bank, knowing that the plaintiff had a package of bonds in the vault, directed the cashier to call upon him and get permission for the bank to use the bonds for the purpose aforesaid, and to render the application successful, Beardsley wrote to the plaintiff a letter of which the following is a copy:

"AUBURN, N. Y., *June 14, 1865.*

"MR. BENJAMIN GOULD:

"DEAR SIR.—At a meeting of our directors yesterday, it was decided to convert the bank into a national bank without delay. This will require a deposit of United States securities to the amount of \$85,000. We have ordered the purchase of part of this sum, but it is not convenient for the bank to spare funds for the whole amount on such short notice. Mr. Starin and I have thought it best to ask you to lend the bank so much of your United States five-twenties as may be needed

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for the purpose named; the bank will replace the securities soon, and before any interest will be due thereon. In addition to the security of the bank for the return of the securities within the time specified, you may consider me as hereby pledging my personal responsibility for the performance on the part of the bank.

“Very truly yours. ”

“N. BEARDSLEY.”

The cashier carried this letter to the plaintiff, and he consented to the use of the bonds by the bank.

On the return of the cashier, he went to Beardsley's office in the bank and informed him of the result of the application, and at once went to the vault and brought with him plaintiff's package of bonds, and on opening it there were found in it \$55,000 of bonds. Beardsley decided to take for the use of the bank \$44,000 of them to be deposited with the comptroller of the currency, and the remaining \$11,000 were placed by the cashier in his private box, kept in the vault, and they were afterwards used by him for his own purposes. The plaintiff was not informed, until years afterwards, that the whole of the \$55,000 of bonds were not used by the bank.

During several years the plaintiff was credited in his bank account with not only the interest on the \$55,000 of bonds, but also of an additional amount of \$19,500 of bonds that plaintiff had on deposit in the bank.

Soon after these bonds were borrowed, and before the time fixed for the return of the same to the plaintiff, the Cayuga County National Bank, which in the meantime had been organized, placed in the hands of its cashier (Starin), available securities to an amount sufficient to purchase bonds to put in the place of those borrowed, and the cashier did purchase and put them in the place of those borrowed, but did not restore any of those borrowed of the plaintiff, although he told the president from time to time that he was purchasing bonds for that purpose, and at one time told him he had purchased

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the whole quantity required to replace the bonds borrowed, except \$10,000.

The cashier appropriated to his own use the whole of the plaintiff's bonds, except about \$3,000.

The plaintiff called at the bank on several occasions between the time the bonds should have been replaced and the discovery of their misappropriation by the cashier, and was, on each occasion, told the bank was using them.

When the plaintiff learned of the loss of the bonds he called at the bank and the president told him his bonds had been replaced by the bank and, therefore, stolen by the cashier, and for that reason insisted that the bank was not liable, and Starin and other officers of the bank made the same statement.

A compromise was finally proposed, and after some negotiation was agreed upon, that the bank and Starin should be released upon paying to the plaintiff \$30,000 in cash and the notes of Starin, payable on demand, for \$63,300 with divers collaterals, and, thereupon, the plaintiff executed and delivered the following release, viz.:

"Whereas a controversy has existed, and does now exist, between Benjamin Gould and The Cayuga County National Bank in relation to the liability of said bank to said Gould, by reason of certain transactions in regard to certain United States securities, which controversy has been amicably settled between the parties by the payment by said bank to the said Gould of the sum of \$25,000, now, in consideration of said sum from said bank, I do hereby release and discharge said bank from all liability or claim by reason of any matter or thing growing out of the matters above referred to.

"AUBURN, *March 13, 1873.*

(Signed)

"BENJAMIN GOULD."

As Starin was insolvent and liable to be proceeded against as a bankrupt, and if so proceeded against within four months from the delivery to plaintiff of the property as collateral to

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his note the transfer would be held void, the attorney of the plaintiff required the promise of the president of the bank, and of another creditor of said Starin, that neither the bank nor such other creditor would proceed against Starin in bankruptcy.

After the execution of this release, and in October, 1873, the plaintiff learned that it was not true that his bonds had been replaced, as was asserted by the officers of the bank and by Starin, and he then renewed his claims against the bank on the ground that he had been induced to release the bank and Beardsley, relying upon the representation that the bonds had been replaced and afterwards misappropriated by Starin, which representation was false and fraudulent.

The action was brought for the value of the bonds and interest thereon. The defendants in their answer deny all the material allegations of the complaint, and as affirmative defenses set up the release and statute of limitations.

On the trial the plaintiff was examined as a witness in his own behalf and was asked by the plaintiff's counsel whether, in all his negotiations, it was upon the basis of the fact that the bonds had been returned to the bank and afterwards taken away by the cashier?

The question was objected to by the defendants' counsel and rejected by the court, to which ruling the plaintiff's counsel excepted.

At the close of the evidence defendants' counsel asked the court to nonsuit the plaintiff, or to direct a verdict for the defendants, and he asked it upon the release and discharge which had been put in evidence.

The court nonsuited the plaintiff.

The plaintiff's counsel then asked the court to submit to the jury the question whether the settlement was or was not procured by the officers of the bank in bad faith, and also the question whether the bank paid any thing.

The court refused said requests, and plaintiff's counsel excepted.

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The court then ordered the case to be heard at general term in the first instance.

Rollin Tracy and *H. R. Selden*, for plaintiff. The motion to dismiss the complaint was granted on the sole ground that the receipt given in evidence constituted a bar to the cause of action. If that receipt was obtained by fraud it constituted no bar. The compromise of a doubtful claim, or claim honestly disputed, is binding upon the parties, but only upon the condition that no fraud has been practiced by either party to produce the compromise (*Stewart* agt. *Ahrenfeldt*, 4 *Denio*, 189; *Farmers' Bank* agt. *Blair*, 44 *Barb.*, 652, 653; *Steele* agt. *White*, 2 *Paige*, 478). That receipt was obtained by a most palpable and wicked fraud, *i. e.*, by the representations of the bank officers that the bonds had been returned to the bank and had afterwards been taken away. It had been decided prior to the time of settlement and giving of that receipt that national banks were not authorized to receive bonds on special deposit for safekeeping, and were not liable for the misappropriation by their officers of securities so deposited (*Wiley* agt. *First Nat. Bank of Brattleboro*, 47 *Vermont*, 546; approved by *ALLEN, J.*, in *First National Bank* agt. *Ocean National Bank*, 60 *N. Y.*, 279, 294; *Weekler* agt. *First National Bank of Hagerstown*, 42 *Maryland*, 581). Hence, the necessity for such representations. The general rule that notice to the agent is notice to the principal applies to corporations as well as to individuals (*McEwen* agt. *Mont. Co. Mut. Ins. Co.*, 5 *Hill*, 101; *Cumberland Coal Co.* agt. *Sherman*, 30 *Barb.*, 560; *Angell & Ames on Corporations*, 299).

W. E. Hughitt and *W. F. Cogswell*, for defendants. The paper executed to the bank by the plaintiff is a technical formal release, and a complete discharge of the cause of action asserted against it (*McCrea* agt. *Purmort*, 16 *Wend.*, 460, 474; *Stearns* agt. *Tappin*, 5 *Duer*, 294). Assume that the

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representations were made and that those representations were false and fraudulent, then the plaintiff cannot set up that the release was void for fraud while at the same time he holds on to the consideration upon which that release was given (*Story on Contracts*, vol. 1, section 623 [fifth ed.]; *Mason agt. Bovet*, 1 *Denio*, 69; *Jennings agt. Gage*, 13 *Ill.*, 610; *Tisdale agt. Buckmore*, 13 *Me.*, 461; *Cocks agt. Rucks*, 34 *Miss.*, 105; *Evans agt. Gale*, 17 *N. H.*, 573; *American ed., Kerr on Fraud*, page 327, note). A contract cannot be rescinded by one party unless both can be placed in the same situation in which they stood previous to the contract (*Chance agt. Commissioners of Clay County*, 5 *Black [Ind.]*, 441; *Pettus agt. Roberts*, 6 *Ala.*, 811; *Buell agt. Pale*, 8 *Blackf.*, 55; *Calhoun agt. Davis*, 2 *Ind.*, 532; *Pettee agt. Hinders*, 19 *Ind.*, 93; *McGuire agt. Callahan, id.*, 128; *Griffith agt. Fred. County Bank*, 9 *Gill. & J.*, 424; *Conner agt. Henderson*, 15 *Mass.*, 319; *Brown agt. Witter*, 10 *Ohio*, 142; *Hammond agt. Buckmaster*, 22 *Vt.*, 375; *Moore agt. Barre*, 11 *Iowa*, 198; *Potter agt. Titcomb*, 22 *Me.*, 800).

MULLIN, P. J. — The plaintiff having been nonsuited solely on the ground that the release was a bar to the action we shall not consider any other of the questions relating to the merits presented by the counsel for the appellant; we can properly review only the legal propositions actually decided by the court below.

The execution and delivery of the release were admitted upon the trial, and unless the plaintiff has by his evidence relieved himself from the operation of them he was rightly nonsuited.

The ground relied upon to relieve the plaintiff from the operation of the release is, that it was obtained by false and fraudulent representations.

Fraud vitiates all transactions into which it enters (*Chitty on Contracts* [11th Am. ed.], 1035).

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It defeats a release as effectually as any other contract (1 *Chitty's Pl.*, 613).

It being competent, then, for the plaintiff to assail the release as fraudulent we are next to inquire whether there was sufficient evidence of fraud given by the plaintiff to require the submission of that to the jury.

The officers of the bank had the means of ascertaining whether the plaintiff's bonds had been replaced. The vault was under their control, and it was the proper place to deposit the bonds if they had been returned. It was not pretended that any search was ever made by any officer of the bank. When they told the plaintiff that the bonds had been returned they stated that which they did not know to be true, and of which they had no knowledge except what they derived from Starin.

Starin's testimony on the trial shows that if he told the other officers of the bank that plaintiff's bonds had been returned he told them an untruth, they had not been and he knew it.

The bank cannot escape the consequences of a false representation made to a person dealing with it, and who by relying upon it is injured, by proving that its officers, or some of them, were told the falsehood by some other agent or officer of the corporation.

The party has the right to rely upon the representation as being a matter within the personal knowledge of the person making it, unless the channel through which the information was received was disclosed to him before he entered into the contract or assumed the liability.

The plaintiff had the right to assume that the officers making the representation as to the return of his bonds had personal knowledge of the fact, and especially had he the right to assume they were not making it upon the faith of the statement alone of the cashier.

This was especially true as to the president. He was employed to watch over the interests and business of the

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bank, to see that neither the cashier or other officers stole or squandered its property or wronged those doing business with it.

It was solely his duty to see that the bonds of the plaintiff were returned. The amount was large. The bank was liable if they were not returned as was he himself. The plaintiff could not hesitate to believe his statement, earnestly and repeatedly made, that the bonds had been returned. He was speaking as the chief financial officer of the bank, and his statement was the statement of the bank.

The counsel of the plaintiff knew, if he did not, that the bank was not liable for the bonds if they had been returned to the bank and thereafter unlawfully appropriated by Starin or any other person.

If he believed the officers of the bank it was not liable, and his only recourse was against Starin; to him must he look for whatever indemnity he should obtain for the wrong done him.

Starin was unable to do more than make good a small part of the loss, and as he was largely indebted to other persons and to the bank itself a compromise became a matter of the highest necessity and importance.

That the representation influenced the plaintiff in agreeing to the compromise and consequent release cannot, it seems to me, be doubted, but if the evidence did not establish the fact to the satisfaction of the court and jury the plaintiff's counsel offered to prove by the plaintiff that in all his negotiations as to the compromise he acted upon the basis of the fact that all the bonds had been returned and afterwards taken away by the cashier.

This evidence the court rejected, and it seems to me improperly. If not necessary to prove the fact offered the evidence was quite material, establishing the fact, as it would tend to do, that the plaintiff relied upon the representation, and was influenced by it, in entering into the compromise.

It is essential, in order to establish a fraudulent representa-

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tion, that it was made with intent to deceive the person to whom it was made (*Kerr on Fraud*, 55).

This intent is established when it is shown that the representation is false within the knowledge of the person making it, or that he had no reasonable ground for believing it to be true, and makes it with the view to induce another to act upon it who does so accordingly to his prejudice though he may not have been instigated by a morally bad motive (*Kerr*, 55, 56).

The representations of Starin came directly within the principle above laid down by Kerr. He was the second highest officer in the bank, had full knowledge of the falsity of the statement and the bank was bound by it. It was made while the cashier was performing the duties of his office and in reference to the business of the bank, and was made with intent to deceive the plaintiff.

If the jury had found these facts as it might have been done the plaintiff was entitled to recover. A case was made for avoiding the release, and that out of the way the right to recover was complete.

It is proper I should say that in preparing the statement of facts that precedes the opinion I made it solely from the evidence of the plaintiff's witnesses without any reference to the evidence on the part of the defense, because the case not being submitted to the jury the plaintiff had the right to require the case to be reviewed on the assumption, by the court, that the jury might have believed the version of the transaction between the parties given by his witnesses.

In view of the legal questions which are put forth in this opinion they are, upon the same assumption, that the evidence of the plaintiff's witnesses is the correct version of the acts and dealings of the parties without any reference to the case as presented by the defendants' witnesses.

The defendants' counsel suggests, as an answer to the alleged fraud in the release, that if the fraud was proved and found by the jury that the plaintiff could not recover as he

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has not returned the property received by him as the consideration of the release.

I do not find that this point was suggested on the trial, and it may be that the plaintiff has an answer to it had it been made. Unless there is an answer to it, it is probably fatal to the plaintiff's action.

If the fact is, as alleged by the plaintiff's counsel, that the bank paid nothing as the consideration for the release it would be void and neither the bank nor Beardsley could require any thing to be returned to them.

These questions will come up on another trial and can be disposed of in view of the whole evidence in the case.

The nonsuit is set aside and a new trial granted, costs to abide the event.

TALCOTT, J., concurring.

SMITH, J., does not sit.

The People *ex rel.* Penn Yan and Branchport Plank-road Co. agt. Martin.

SUPREME COURT.

THE PEOPLE *ex rel.* THE PENN YAN AND BRANCHEORT PLANK-ROAD COMPANY agt. GEORGE W. MARTIN, commissioner of highways of the town of Jerusalem.

Commissioners of highways to perform duties of plank-road inspectors — their determinations must be in writing — Mandamus.

The determination of a commissioner or commissioners of highways (who, by the *Laws of 1877, p. 171, chapter 164, sec. 1* amending *chapter 440, sec. 3 Laws of 1873*, are made inspectors of plank-roads), that the road is out of repair, or in such condition that it cannot be conveniently used by the public, and ordering the toll-gate to be thrown open, is that of a tribunal acting judicially, and should therefore be in writing.

When they have once ordered the gate to be thrown open, and after that, upon a subsequent inspection, on the application and claim of the plank-road company that the road has been put in repair, they make a determination that the road has been fully repaired and is in proper condition to the satisfaction of such inspector or commissioner, it is *not sufficient* to evidence such determination by an oral declaration, *but it should be reduced to writing.*

Yates Special Term, June, 1878.

MOTION for mandamus.

Mr. Butler, for motion.

Mr. Stewart, opposed.

ANGLE, J.— By the statute (*Laws 1877, p. 171, ch. 164, sec. 1, amending ch. 440, sec. 3 Laws 1873*), the construction of which is involved in this motion, it is made the duty of plank-

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road inspectors to inspect such roads at least once in each month; it is also provided that after a gate has been once thrown open by the order of the inspectors, because the road is out of repair or in such condition that it cannot be conveniently used by the public, such gate "*shall not be closed until such road shall be fully repaired or be in proper condition to the satisfaction*" of such inspector. As commissioners of highways are now inspectors of plank-roads and as the number of commissioners may be from one to three, as the town shall have determined, it must be borne in mind in construing this statute that it is providing a method of procedure applicable to all towns, and the commissioner or commissioners (as the case may be) are by it clothed with the power of making a determination, which is judicial in its character alike when performed in towns where there is but one inspector and in towns where there are three inspectors.

The question here is whether, when this tribunal has once ordered the gate to be thrown open, and after that, upon a subsequent inspection, the application and claim of the plank-road company that the road has been put in repair, it makes a judicial determination, is it sufficient to evidence that determination by an oral declaration or should it be reduced to writing. The original notice and order to open the gate must be in writing and if the result of the subsequent inspection upon the claim of the company that their road is repaired and in good condition is, that the inspectors are satisfied that it is so repaired and in such condition, it would hardly be questioned that such satisfaction should be evidenced by a written order, so as to be of equal certainty and dignity with the first order, the force of which it stays or abrogates; and if a decision one way is to be in writing, it seems to me if the decision be the other way it should be in writing.

Upon these two grounds, then, I am strongly impressed that the commissioner should make a written order in this case.

1. The determination is that of a tribunal acting judicially

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and should, therefore, be in writing (*Smith agt. Spaulding*, 3 *Rob.*, 615).

2. The first order being in writing the subsequent determination on the same matters, or growing out therefrom, should be in writing.

An order may be entered for an alternative mandamus without costs of this motion.

Clark agt. Jacobs.

SUPREME COURT.

FLORA C. CLARK agt. HANNAH M. JACOBS and others.

Vendee's lien for purchase-money paid — how enforced — Purchaser with notice — Power of sale — Will, construction of — Limited bequest — Equitable interests.

A lien exists in favor of a vendee when the purchase-money, or a part of it, has been prematurely paid by him, before a conveyance of the land. Such lien will be protected, in favor of the vendee, against every one but a bona fide purchaser without notice of the lien.

But upon a purchase of land, which involves a breach of trust, as when a trustee himself undertakes to purchase the trust estate for his own advantage, no such lien arises in his favor for moneys paid.

Nor does such lien exist when a purchaser has, by his own default, abandoned the contract of purchase.

Where persons entered into a contract for the purchase and sale of land, and a part of the purchase-money was paid by the vendee, and a conveyance was executed and placed in *escrow*, to be delivered when the residue of the purchase-money should be paid, and the lands were afterwards conveyed away, so that the contract of purchase could not be fulfilled:

Held, that the vendee could follow the land in the hands of persons who had taken title with knowledge of the vendee's equity, and that it was not necessary, in order to invoke equitable relief and enforce the lien out of and against the land, that the vendee should tender the balance of the purchase-money; that, under the circumstances, a tender was excused.

Where a purchaser of land takes the title with notice of the equitable rights of a third person, he holds the property subject to such equitable rights (*Brown agt. Goodwin*, 1 Abb. N. C., 452).

Power of sale — Where an executor, clothed with a *power of sale* under a will, entered into an agreement with the persons beneficially interested under the will to purchase the land from them:

Held, that the agreement was not necessarily void. But if the transaction could be questioned it was for those interested in the land under the will, and not for strangers, to object.

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Will—Where a testator in the opening sentence of his will, in view of a dangerous voyage upon which he was about to enter, declared that he deemed it his duty to make a will "*for the benefit and protection of my wife and children,*" who are named, and then in one connected sentence in his will disposes of his property and appoints an executor in these words: "I do, therefore, make this my last will and testament giving and bequeathing to my wife, Caroline, all of my property, real or personal, of whatever name or nature it may be in, that I am now possessed of or is owned by me, &c., &c., and do appoint my wife, Caroline, my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named."

Held, that the gift to the mother was not absolute, but that the children had, with their mother, a substantial interest in the property which a court of equity would recognize and protect.

Words in the opening clause of a will, as all other material parts, are to be considered in construction (*Youngs* agt. *Youngs*, 45 N. Y., 254).

Precatory expressions in a will have been construed as creating a trust where the objects to be benefited were well described, and the property, to which the trust should attach was sufficiently defined.

Lambe agt. *Eames* (L. R. [6 Chy. App.], 597) and *Markett* agt. *Markett* (L. R. [14 Eq.], 49; S. C., 2 Eng. R., 412) distinguished.

Taggart agt. *Murray* (53 N. Y., 233) and *Smith* agt. *Bowen* (35 id., 83) applied.

Special Term, December, 1878.

DEMURRER to complaint, the grounds of demurrer assigned, being that the complaint does not state facts sufficient to constitute a cause of action.

The demurrants are the defendants The Mutual Life Insurance Company and William H. Leup.

Edmund Coffin, Jr., for plaintiff.

Turner, Lee & McClure, for defendants.

R. A. Piper, for defendant Leup.

VAN VORST, J.—A lien in favor of the vendor, for the purchase-money, where the title to the land had passed to the vendee, is well recognized by numerous cases.

A lien in favor of the vendee, when the purchase-money,

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or a part of it, has been prematurely paid before a conveyance, is not so well supported by authority in this state. But sufficient has been decided to recognize and declare the existence of such lien.

In *Chase agt. Peck* (21 N. Y., 589) DENIO, J., denominates this lien as an equitable mortgage. He says: "It will be allowed in favor of a vendor for unpaid purchase-money, or of a purchaser, who has advanced his money, on the faith of a contract, for a conveyance."

And he again says: "It is well settled that the interest of the vendee will be protected against every one but a *bona fide* purchaser or incumbrancer, without notice of the vendee's equity. In such case the vendee is considered in equity as the owner and the vendor as his trustee."

In the English court of chancery this doctrine has been laid down in numerous cases.

It is considered at length, and well sustained in *Wythes agt. Lee* (3 *Drewry*, 396), and is upheld both upon the ground of natural justice and authority.

The vice-chancellor says: "When a contract is made and then goes off, it appears to me, that in principle and justice, the equity of the purchaser, to a lien on the estate, ought to stand on as good footing as the lien of a vendor after conveyance" (*Rose agt. Watson*, 10 H. L. C., 672; *Parks agt. Jackson*, 11 Wend., 442; *Abraman Iron Works agt. Wickens*, 4 L. R. Chy. Ap., 101, 109).

This lien exists not only against the vendor but as against a subsequent purchaser or mortgagee who has notice of the payment having been made.

But it is urged by the learned counsel for the defendants, that no lien could arise, in this case, for the reason that the agreement to purchase, made by the plaintiff's father, under which she claims, was made by him with the devisees and persons interested under the will of Maria Clark, deceased, in the land in question, by which will he was constituted executor and trustee.

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James A. Clarke, the plaintiff's father, was executor under Maria Clark's will and as such was appointed trustee and was invested with a power of sale, and was directed to divide the proceeds among the children and grandchildren of the testatrix.

Had he, as a trustee under this will, attempted to exercise the power conferred upon him by selling and conveying, as executor and trustee, to himself, as an individual, such transaction, upon objection from those entitled to object, would not be upheld and he could not have acquired any lien upon the property for any moneys he might claim to have advanced towards the completion of such transaction.

A sale to himself would be a breach of trust, and no equitable right, of the nature of the one here sought to be enforced, could arise from it. Nor would such lien exist when a purchaser has, by his own default, abandoned the contract.

But the complaint alleges that the agreement was made by James A. Clarke with the devisees and persons beneficially interested in the land; that the consideration, in so far as it has been paid, was received by them and that in execution of the agreement of purchase and sale, a deed has been made and signed by them and placed in *escrow* to be fully delivered when the residue of the purchase-money shall be paid.

In entering into this agreement to purchase the executor and trustee was not attempting to execute the power of sale conferred upon him by the will.

Now although equity disfavors the purchasing of property by a trustee of the *cestui que trust*, yet such transaction is not absolutely void; not necessarily so. The *cestui que trust* may take measures to avoid it. But he has ability to stand satisfied with the transaction. He may not wish to repudiate it and is not obliged to do so. He may, upon consideration, adopt and sanction the act.

And as the persons beneficially interested in the land have, in fact, received, to their own use, the amount of the consideration paid and have made and executed a conveyance which

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is in *escrow* and do not appear to have repudiated the transaction, it is not for strangers to object and allege the invalidity of the agreement to purchase and sell.

This objection is personal to the *cestui que trust* in so far as the questions here to be considered are concerned (*Case agt. Carrol*, 35 N. Y., 385).

It is also objected, on the part of these defendants, that the plaintiff does not, by her complaint, announce a readiness to perform the agreement, that she expresses no willingness to pay the residue of the purchase-money, and take the land, and makes no tender. .

If the "*status quo*," at her father's death, continued up to the commencement of this suit, and this was an action against the devisees and beneficiaries under the will of Maria Clarke, I would conclude that the plaintiff's remedy would be by an action to compel a specific performance of the agreement in which it might be determined, whether or not, for any reason, the agreement should be performed and if not whether the consideration-money should be returned.

But upon the death of the plaintiff's father, the office of trustee, under the will of Maria Clarke, became vacant and Herbert B. Turner was appointed, by this court, trustee, in his room, to carry into effect the trusts created by the will in so far as they remained unexecuted.

The power in trust to sell the real estate had not been exercised by the trustee, James W. Clarke.

But Herbert B. Turner, the substituted trustee, sold and conveyed the premises to Caroline M. Clarke, the mother of the plaintiff, for the consideration of \$8,000.

Caroline M. Clark, on the same day in which she received the deed executed a mortgage to the defendant, The Mutual Life Insurance Company, to secure the payment of a loan made to herself of \$8,000. This mortgage is now outstanding. Afterwards she executed a mortgage to James W. Clarke, for \$3,000, to secure a loan to herself of that amount.

This mortgage has been foreclosed and, under the decree

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made therein, the premises have been sold and purchased by Michael Ryan who afterwards conveyed them to the defendant William H. Leup.

The complaint alleges that, at the time of the execution and delivery of the several conveyances and mortgages, the several parties to them had full knowledge of all the facts and circumstances which are detailed in the complaint.

The plaintiff alleges that all these transactions were without her knowledge or consent and that she has received nothing on account of the same.

The conveyance by Mr. Turner, the trustee, in execution of the power of sale, under the will of Maria Clarke, deceased, and the subsequent mortgaging of the same premises and the sale and conveyance under one of the mortgages, dispenses with an action for a specific performance and justifies an action to enforce a lien for the purchase-moneys paid, unless there be some legal or equitable objection to be urged against the lien itself.

A tender now, by the plaintiff, of the balance due of the consideration-money, either to the devisees, under the will of Maria Clarke, or to Mr. Turner, the substituted trustee, would be an idle ceremony. The land itself has been conveyed away.

It is out of the power of the parties to fulfill the contract (*Shaw agt. The Republic Life Ins. Co.*, 69 N. Y., 293; *Crist agt. Armour*, 34 Barb., 378).

If the plaintiff has any right at all it can only be enforced through an action to have the lien declared and enforced upon, and out of the lands in question, in the ownership and possession of these defendants, who, according to the allegations of the complaint, acquired their rights and interests with full knowledge of all the facts out of which the lien is claimed to have arisen.

For while it is beyond question that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal title at the time of his purchase, is entitled

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to priority in equity as well as law according to the maxim, that "when equities are equal the law shall prevail," at the same time it is equally true that if the purchaser, though he does pay a valuable consideration, have notice of the equitable rights of a third person he shall hold the property subject to such equitable right (*Brown agt. Goodwin*, 1 *Abbott's New Cases*, 452-462).

It does not appear whether or not the persons beneficially interested in the land, under the will of Maria Clarke, joined in the conveyance to Caroline M. Clarke. Sufficient, however, is alleged in the complaint to show that the sale was made by Mr. Turner, in execution of the powers under the will, and that the trustee could convey away the legal title to the land and that the consideration paid was to the use of the beneficiaries under Maria Clarke's will.

The next question which arises, and it is one of importance, is whether the conveyance, to the plaintiff's mother, is a legal answer to the plaintiff's action?

The answer to this question involves a consideration of the will of James A. Clark, the plaintiff's father, and of the rights of Caroline M. Clarke and her daughter thereunder.

If Mrs. Clarke, under her husband's will, succeeded in her own right to all his property, including his interest in the premises in question then the plaintiff has no interest or standing to maintain this action.

For, under such circumstances, on the payment by her of the balance of the purchase-money, she would have been entitled to a conveyance from the devisees and beneficiaries, under the will of Maria Clarke, who contracted with her father or from the substituted trustee, Mr. Turner, if he adopted the contract and chose to carry it out.

In considering a will to determine its legal effect no material part is to be disregarded.

The words of the opening clause of a will are not without their influence in determining the intention of the testator

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(*Youngs* agt. *Youngs*, 45 *N. Y.*, 254; *Earl* agt. *Green*, 1 *John. Chy.*, 494; *Betts* agt. *Betts*, 4 *Abb. N. C.*, 317, 426.)

The testator, in the opening sentence of his will, in view of the dangerous voyage upon which he was about to enter, declares that he deemed it his duty to make a will, in his own words, "for the benefit and protection of my wife and children," who are named. He then, in one clause, in fact in one connected sentence, disposes of his property and appoints a person to execute his will, in these words :

"I do, *therefore*, make this my last will and testament, giving and bequeathing to my wife Caroline all of my property, real or personal, of whatever name or nature it may be in, that I am now possessed of, or is owned by me, or that I may have or be possessed of at the time of my death, or that I may inherit, or fall to me by relationship, or by gift before or after my death, and do appoint my wife Caroline Maria, *my true and lawful attorney* and sole executrix of this my will, *to take charge of my property* after my death, and *retain* or *dispose* of the same for the *benefit of herself and children* above named."

No words in the will are, however, underscored, but I have chosen so to designate parts which indicated to me the purpose and object of the will, and the dispositions intended to be made of the property. The word "*therefore*," in the opening part of the disposing clause of the will, refers to the motive antecedently expressed, the "*duty*" to make a disposition of his property for the benefit and protection of his wife and two children.

This duty the testator attempts to meet and discharge, by the disposition of his property which follows, and which it is obvious is emphasized in the closing words of the sentence, by which he commits his property to the charge of his wife, as his *attorney* and *executrix*, to be retained or disposed of, for the benefit of herself and his children.

In his expressed desire to benefit and protect his two

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children equally with his wife, through his property, he had followed the instincts of nature, and spoke its language, and he properly calls it a duty.

The question arises, has he failed in his written words to carry out his intentions, or to attain his object?

Is it true, in the words of the learned counsel for the defendants, in his brief submitted, "that the devise to Mrs. Clark is full and complete, and it is difficult to imagine a more elaborate grant in fee simple absolute, not burdened by any condition, or curtailed by any limit of estate?" If that be so I do not see but that the testator has wholly failed to carry out his intentions.

The plaintiff alleges in her complaint, that she has received nothing in any way from the estate of her father, or any one on account of same. That Caroline M. Clark (the executrix) is insolvent, and that there are no assets remaining belonging to her father's estate, except such right as may arise from her interests in this action.

The testator did not intend, I am persuaded, to construct a will, by the terms of which a wrong to his child should be accomplished, and she be deprived of participating in the benefit and protection which his property would afford.

The idea advanced on the behalf of the defendants is, that the power of the executrix under the will, to dispose of the property for the benefit of herself and children is discretionary, "and imposed no trust, on her in favor of the children." That it was "a mere recommendation of the children to her charitable consideration." That the testator intended "to cut off his children and throw them entirely on his wife's bounty." Such, in words, is the defendants' claim, and it amounts to this, that the dominion of the executrix over the property was absolute and unfettered, to dispose of it, spend it, or deal with it and its proceeds as she liked.

I cannot accept such conclusions. I cannot think that the testator meant merely to recommend his children to the charitable consideration of their mother, or leave their right to a

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participation in his estate, dependent exclusively upon her will or disposition.

On the other hand I conclude that he meant to give them, with her, a substantial interest in his property, one which a court of equity would recognize and protect.

In *Lamb agt. Eames* (*infra*), cited by defendants' counsel, JAMES, L. J., says: "I cannot agree that she (the widow) is to take what she likes, and that what she has not spent is to go, at her death, for the benefit of her children." *Crockett agt. Crockett* (2 Ph., 553) was cited which decided that the children had some interest, and that the widow satisfied the obligation.

Precatory expressions in a will have been construed as creating a trust when the objects to be benefited were well described and the property to which the trust should attach was sufficiently defined (*Paul agt. Compton*, 8 Vesey, 380; *Hawkins on Wills*, 165, and cases cited).

But the intention of the testator with respect to his children and their interest in his property is not expressed in words merely recommendatory. I apprehend that the widow has no discretion to withdraw from her children a participation, with herself, in the property.

The learned counsel for the defendant refers to *Lamb agt. Eames* (L. R. [6 Chy. App.], 597) where a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family."

That case is clearly distinguished from the present. All that was said with respect to the purpose of the testator is contained in the words above quoted. There was no prefatory statement as in the case under consideration. In that case, by the terms of the gift, the widow might dispose of the property in any way she might think best. No such latitude, in terms, is given by Mr. Clarke to his widow. Should she retain the property it was for the joint benefit of herself and children; if she disposed of it it must be for the same ends.

Besides, in the case cited, we have the word "family," an

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indefinite expression. Such a trust, on account of the uncertainty of its objects, it would be impossible for a court well to execute. The court so states.

There is no uncertainty in the will under consideration. The persons to enjoy the property are all named, and there is no difficulty in executing the will in their favor. *Mackett agt. Mackett* (L. R. [14 Eq.], 49; S. C., 2 Eng. R., 412) is also clearly distinguishable from the present.

In that case there was an attempt to cut down a prior unqualified gift. The words of the gift were "to and for her proper use and benefit forever."

There was a subsequent direction in regard to an application of the proceeds. The testator's intention was clearly expressed, without qualification, to vest Mrs. Mackett with an absolute interest in the property, unaffected with any trust with respect to the proceeds. The subsequent words used were ineffectual to cut down the gift.

It is true that to cut down an absolute gift the subsequent portions of the will must show a clear intention on the part of the testator to work such result.

I think the preface to the will under consideration and the concluding words of the disposing clause show that the gift to the wife was not absolute.

To ascertain the testator's intention the entire sentence must be read as a whole. A delivers his horse to B and says I give you this horse, to be retained or disposed of by you as my attorney, for the benefit of yourself and C and D, your children. That is not an absolute gift of the horse to B.

I do not think that there are repugnant clauses in this will to be reconciled. I think the intention of the testator to create the trust for the benefit of his wife and children is plain. But if there was a repugnancy the rule laid down in *Taggart agt. Murray* (53 N. Y., 283), ANDREWS, J., is that "effect is to be given, if possible, to all the provisions of the will, and no clause is to be rejected, or interest intended to be given

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sacrificed, on the ground of repugnance when it is possible to reconcile the provisions supposed to be in conflict."

In accordance with this rule it was held that subsequent clauses in a will are not incompatible with, or repugnant to, prior clauses in the same instrument, where they may take effect as qualifications of the latter, without defeating the intentions of the testator in making the prior gift.

If the contention of the counsel for the defendants is correct the children have no rights or interests which their mother was bound to recognize. She can, without any just ground of complaint from them, dispose of all the proceeds of this estate to her own use.

Now, the heir is not to be disinherited without an express devise or necessary implication, such implication imputing not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed (*Lyner agt. Townsend*, 33 N. Y., 558; *Quinn agt. Hardenbrook*, 54 *id.*, 83).

The case of *Smith agt. Bowen* (35 N. Y., 83) is very like the one now under consideration. It supports the view that the gift to Mrs. Clarke was a trust, in which her children had a beneficial interest which could not be impaired or destroyed by the act of the trustee in breach of the trust, and which would follow the land in the hands of any person to whom it was conveyed by the trustee with knowledge of the trust.

The question then arises, did the conveyance to Caroline M. Clarke by Mr. Turner, the trustee, absolutely extinguish the lien for the purchase-money paid by the husband? I think not.

Had she been legally entitled under her husband's will to receive a conveyance to herself, for her own use, the lien would be gone. But she was not so entitled. The conveyance was not made to her in any representative character, but as an individual. She was dealt with as such. She paid the consideration, and received the money loaned as such. It is

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not necessary to decide whether or not Mrs. Clarke could have purchased this property, and paid the consideration in any representative character under her husband's will. She did not undertake to do so.

The mortgagees when they loaned their moneys and took their securities upon the land, as appears by the complaint, acted with their eyes open to all the facts and circumstances, and are chargeable with notice of the plaintiff's equitable rights and interest. The purchaser under the foreclosure sale is in the same condition.

The loans made to Mrs. Clarke, for which the mortgages were given, were made to herself, and the mortgages were executed in her individual capacity. They cannot well be interposed by the mortgagee and person who took through the mortgage sale, with notice, to defeat the plaintiff's equitable claim and interest, which attached to the land, and has not been lost. It appears by the complaint that she has succeeded by assignment to the interest of her mother and brother under her father's agreement to purchase. But I do not think that she took any thing under such assignment. As to her mother and brother they would be estopped from setting up any claim, for the reason that as to the mother she took a conveyance of the land, and the brother recognized his mother's title by taking a mortgage thereon himself, for money loaned by him on its faith. But as to her own interest in one-third of the purchase-money paid by her father, I do not find that the plaintiff has done or omitted any thing to prejudice her claim, and to that extent I think the complaint discloses a cause of action.

There are difficulties in the plaintiff's path even to the extent of relief found to be in her favor. The questions involved are serious, and the conclusions reached, not free from doubt, even in my own mind. Yet the result appears to me to be just and equitable.

It is suggested by the plaintiff's counsel that the trust created under the will of James W. Clarke was void and that

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in consequence the fee and title to his property vested immediately in the mother and two children. It has not seemed important to pass upon that question. If that be so, however, it makes the plaintiff's right to recover one-third of the purchase-moneys and to enforce her lien to that extent, the clearer.

There must be judgment for the plaintiff, on the demurrer, with liberty to the defendant to answer on payment of costs.

D I G E S T

CONTAINING THE WHOLE OF

56 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 14 AND 15 HUN, AND 71 AND 72 N. Y. REPORTS.

Attention is called to the two additional headings "CODE OF PROCEDURE" and "CODE OF CIVIL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of both Codes.

ABATEMENT AND REVIVAL.

1. In this action, brought to restrain the defendant from entering upon certain lots, and cutting and removing timber and bark therefrom, a temporary injunction was granted. Subsequently, and before trial, defendant died. More than two years after his death his heir at law and administratrix applied for an order requiring the plaintiff to substitute them as defendants and continue the action by supplemental complaint, or that the action be discontinued:

Held, that an order to that effect was properly granted, and that the same should be affirmed. (*Johnson* agt. *Elwood*, 15 *Hun*, 14.)

2. No mere lapse of time will absolutely defeat an application for the continuance of an action at law in the name of the representative of a deceased party. (*Evans* agt. *Cleveland*, 72 *N. Y.*, 486.)
3. When action properly revived against executor of the survivor of several defendants who were joint debtors. (*See Schooley* agt. *Halsey*, 72 *N. Y.*, 578.)

ABANDONMENT.

1. Chapter 895 of 1871, relating to persons who abandon or threaten

to abandon their families in the county of Kings, was not intended to provide a civil remedy for the benefit of wives and children, but to protect and indemnify the public against the expense of supporting paupers, and it partakes of the nature of a criminal proceeding. The facts that a husband has abandoned his wife and children in some other county or state, and that the wife has subsequently come to, and resides in, the city of Brooklyn, does not authorize proceedings against the husband to be instituted under said act. (*Bayne* agt. *People*, 14 *Hun*, 181.)

ACCOMPLICE.

1. The rule that the evidence of a paramour or other accomplice is to be listened to with caution, and should be corroborated, only applies when the witness admits the criminality alleged, not where such witness appears only in obedience to process and denies any criminality. (*Pollock* agt. *Pollock*, 71 *N. Y.*, 188.)

ACCOUNT BOOK.

1. In an action to recover money alleged to have been advanced to defendant by plaintiffs, one of

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plaintiffs' clerks testified that he made in their books the following entry: "Herman Von Keller, on account, \$10,000." that he had no recollection of the facts contained in it, except that it was like a particular check he was told to draw; or of its correctness, except from its being in the book:

Held, that the entry was not sufficiently authenticated to render it evidence of any thing. (*Peck agt. Von Keller*, 15 *Hun*, 470.)

ACKNOWLEDGMENT.

1. The defendant made and filed an inventory of the estate of his intestate; he made a copy, and inserted at the foot thereof copies of two promissory notes, given by him to the deceased, and inclosed the same to his co-administrator, in a letter, saying, "Inclosed I send a copy of the inventory taken yesterday."

Held, that the copies of the notes and letter constituted a sufficient written acknowledgment of the notes to take them out of the statute of limitations. (*Clark agt. Van Amburgh*, 14 *Hun*, 557.)

ACTION.

1. The firm of L. Richards & Co. sold all their stock of goods, inventoried at \$6,000, to the defendants, who, in consideration thereof, agreed, at their own proper cost and expense, to settle, satisfy and pay all debts against the said firm mentioned in a certain schedule marked B, on such terms and conditions as they might be able to agree upon with the creditors mentioned in said schedule, and to save said firm harmless from any and all of said creditors. The schedule described a debt, "Rice, Goodwin, Walker & Co., \$1,007.21," for which the said firm had previously given its promissory notes, which the payees thereof had

caused to be discounted at the National Park Bank before the agreement had been made, and which, subsequently, and after the date of the agreement made by the defendants, were transferred to the plaintiff. In this action, brought by him to recover the amount thereof:

Held, that the promise of the defendants to settle and pay the debts was an absolute and unconditional one, and that the words "on such terms and conditions as they might be able to agree" with the said creditors did not in any way change or qualify their obligation. (*Brown agt. Curran*, 14 *Hun*, 260.)

2. *Held*, further, that the promise was not limited to the creditors named in the schedules, but could be enforced by a subsequent purchaser of any of the debts therein mentioned. (*Id.*)
8. Where a testator has, by his will, conveyed an estate in certain lands to his wife, which estate is claimed by her to be an estate in fee, and by his heirs at law to be one for her life only, the heirs at law cannot maintain an action for the judicial construction of the will, and to have the estate to which she is entitled judicially determined. (*Marlett agt. Marlett*, 14 *Hun*, 813.)

4. A testator appointed his wife executrix of his will, and gave to her his residuary estate either for life or absolutely:

Held, that his next of kin could not maintain an action to have the nature of the estate to which she was entitled declared, unless it was shown that she was squandering or wasting the estate, or that she was unable to respond to the plaintiff, at the termination of the life estate, or to those who might then represent them. (*Id.*)

5. The fact that a portion of the persons assessed have paid their

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assessment does not prevent the maintenance of an action by the others to restrain further proceedings thereunder. (*Kennedy* agt. *City of Troy*, 14 *Hun*, 308.)

6. Plaintiff, by different attorneys, commenced two actions to foreclose the same mortgage. While both actions were pending, upon plaintiff's application, and against defendant's objection, an order was made discontinuing the second action on payment of costs. Subsequently plaintiff, on an *ex parte* application, procured an order vacating the former one, reviving the second action and discontinuing the first. Thereafter the defendant moved to vacate the second order:

Held, that the application should be granted. 1. Because it was irregular to grant the order without notice to defendant who had appeared. 2. Because, after an action has been discontinued by a party, it should not be again restored unless the order was obtained by fraud. (*Smith* agt. *Green*, 14 *Hun*, 529.)

7. April 10, 1877, a warrant of attachment, summons and complaint against Josiah Strayer were delivered to the sheriff for service. April fourteenth a levy was made under the warrant. On April eighteenth Strayer died, not having been served with the summons. On May twenty-eighth an order was granted allowing the action to be continued by the service of a summons and complaint therein on the defendants, his administrators; and on June eighteenth they were served upon them:

Held, that as the summons was not served within thirty days from its issue, the warrant of attachment and the levy thereunder were void. (*Kelly* agt. *Countryman*, 15 *Hun*, 97.)

8. A complaint alleging that the defendant sold intoxicating liquors to plaintiff's husband, intoxicating

him and rendering him incapable of labor and of supporting the plaintiff, and so injuring him as to cause his death, and that, by reason of his death, plaintiff had been injured in property and means of support to the amount of \$5,000, does not state a cause of action under the civil damage act. (*Brookmire* agt. *Monaghan*, 15 *Hun*, 18.)

9. The complaint alleged that the defendant Hibner made his note to the order of the defendant Gould; that it was by the latter indorsed and delivered, for value and before maturity, to the plaintiff, who was the owner and holder thereof. The answer, without denying any allegation of the complaint, alleged that the note was seized as the property of one Burlingame, in proceedings instituted against him for absconding and leaving a wife and children liable to become charitable to the town, and that by virtue thereof the property in the said note became, and continued to be, vested in the overseer of the poor of said town:

Held, that these facts constituted no defense, the allegation of the complaint being admitted, and that proof thereof was properly rejected. (*Furwell* agt. *Hibner*, 15 *Hun*, 280.)

ADDITIONAL ALLOWANCE.

1. *Quare*, as to the right of the defendant to move for an additional allowance of costs, after the entry of an order which provided "that the plaintiff have leave to discontinue the above-entitled action upon payment of the defendant's costs up to the present time, with the costs of this motion, said costs to be adjusted by the clerk of this court," etc. (*Society of N. Y. Hospital* agt. *Coe*, 15 *Hun*, 440.)

2. In ascertaining whether the additional allowances granted by the surrogate of New York exceed

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the limit of \$2,000 fixed by section 809 of the Code, an amount awarded to the court stenographer is not to be considered; such amount is a disbursement in the case, and not in the nature of costs. (*Down agt. McGourkey*, 15 *Hun*, 444.)

ADMINISTRATORS.

1. The title of an administrator, *de bonis non*, with the will annexed, relates back to the death of the testator, and he may recover not only upon causes of action in favor of the testator in his lifetime, but also for causes of action arising after his death in regard to the assets. (*Lucers agt. Brunges*, ante, 282.)
2. *Walton agt. Walton* (4 *Abb. Ct. App. Dec.*, 512) applied. (*Id.*)
3. By operation of law, not only the unadministered assets of the testator in specie, in the hands of the executor or others, pass to the administrator, *de bonis non*, with the will annexed, but also the moneys and securities realized on any sale thereof by the executor, for the purpose of further administration, which have not lost their identity, and can be distinguished from the individual property of the executor. (*Id.*)
4. Where a bond and mortgage were executed and delivered to F. and B., as executors of the last will and testament of L., deceased, the principal sum secured thereby being made payable to F. and B., as executors, their survivors, successors or assigns:
Held, upon demurrer to the complaint, that, upon the removal of F. and B. from their office as executors, and letters of administration, *de bonis non*, with the will annexed, having been issued, by operation of law, the bond and mortgage passed to the administrator, with the will annexed, and

that he could maintain an action for the foreclosure of the same. (*Id.*)

5. The plaintiff, in his complaint, claims that the principal sum secured by the mortgage, with installments of interest, were due and unpaid, but failed to state facts showing the principal to be due:

Held, upon demurrer, that the action of foreclosure could be sustained for the non-payment of interest. (*Id.*)

ADMISSIONS AND DECLARATIONS.

1. This action was brought to recover the value of services rendered to the defendant in procuring a pension for her. It appeared that the plaintiff had been indicted and convicted in the United States court for charging excessive fees for getting the pension. While that indictment was pending, he had returned to the defendant \$110, which she had previously paid to him. On the trial of the indictment, his counsel, in summing up, had spoken of this as an act of generosity on his part. Upon this trial, this statement of his counsel was allowed to be proved as an admission of the plaintiff:

Held, that it was error to allow the statement to be proved. (*Adee agt. Howe*, 15 *Hun*, 20.)

2. Declarations of agent, not connected with acts as agent, inadmissible against principal. (*See White agt. Miller*, 71 *N. Y.*, 118.)
3. Where it appears that a debtor and others have joined in a conspiracy to defraud the creditors of the former by a fraudulent disposition of his property, the acts and declarations of the debtor, made in the absence of the others, but in execution of the common purpose, and in aid of its fulfill-

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ment, are admissible against them. (*Dewey* agt. *Moyer*, 72 N. Y., 70.)

4. The declarations of a bankrupt, made before the bankruptcy, are admissible as evidence against his assignee in bankruptcy to establish or support a claim against the estate of the bankrupt. (*Von Sachs* agt. *Kretz*, 72 N. Y., 348.)
5. A vendee of chattels or an assignee of a chose in action must be a purchaser for value in order to exclude the declarations of a prior party in interest from whom he derived title, made before such party parted with his interest. (*Id.*)
6. Of husband, when not admissible against wife in action on policy of insurance on his life. (*See Stillwell* agt. *Mut. Fire Ins. Co.*, 72 N. Y., 385.)
7. When declarations and representations of agent are competent as part of the *res gestæ*. (*See Mor. Bk.* agt. *Griswold*, 72 N. Y., 472.)

ADMISSION OF SERVICE.

1. August 9, 1858, a summons was issued against the defendants, Angell and Mackey, on which Angell indorsed the following admission: "I admit due personal service of a copy of the within summons, August 9, 1858. E. D. ANGELL." August 31, 1858, a judgment was entered in the supreme court against both defendants on a joint liability. In a proceeding to enforce the judgment against Mackey, the court at special term decided that the judgment was void because of defects in the admission of service.
Held, that it was immaterial that the admission was of the service of a copy of the summons, instead of the summons itself. (*Maples* agt. *Mackay*, 15 Hun, 533.)
2. That the admission showed sufficiently the time when the service

was made, viz.: on August 9, 1858. (*Id.*)

3. That no proof of the genuineness of the signature of Angell being required by the Code, its absence would not render the judgment void. (*Id.*)
4. That the judgment being that of the highest court of original jurisdiction, the fact that the admission did not show the place of service did not render the judgment void. (*Id.*)

AFFIDAVIT.

See OFFER.

Riggs agt. *Waydell*, ante, 247.

1. In compliance with the requirements of section 12, chapter 463 of 1853, the plaintiff in error, as president, and one Allen, as secretary, of a life insurance company, prepared a statement purporting to exhibit, among other things, the assets of the company at the close of the year 1875, and caused the same to be filed with the superintendent of the insurance department. The statement was verified by the following affidavit:

STATE OF NEW YORK, }
City of New York, } ss.:

"Robert L. Case, president, and Isaac H. Allen, secretary, of the Security Life Insurance and Annuity Company, being duly sworn, depose and say, and each for himself says, that they are the above described officers of the said company, and that on the thirty-first day of December last all the above described assets were the absolute property of the said company, free and clear from any liens or claims thereon, except as above stated; and that the foregoing statement, with the schedules and explanations hereunto annexed and by them subscribed,

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are a full and correct exhibit of all the liabilities, and of the income and disbursements, and of the general conditions and affairs of the said company on the said thirty-first day of December last, and for the year ending on that day, according to the best of their information, knowledge and belief, respectively.

"ROBERT L. CASE.

"I. H. ALLEN, *Secretary*.

"Subscribed and sworn to before me, this 19th day of February, A. D. 1876.

[L. s.] "MOSES B. MACLAY,

"Notary public for the city of New York."

Upon the trial of the plaintiff in error for perjury in swearing to this affidavit:

Held, that the words "according to the best of their information, knowledge and belief, respectively," only served to qualify so much of the said affidavit as was subsequent to the semicolon, and that as to those statements which preceded the semi-colon the affidavit was absolute and unqualified. (*Case* agt. *People*, 14 *Hun*, 508.)

2. Affidavits of foreclosure and sale in proceedings to foreclose a mortgage by advertisement may be taken before notaries public; by the act of 1859, in relation to these officers (*chap. 360. Laws of 1859*) they were added to the list of officers who, under the Revised Statutes (2 *R. S.*, 547, *sec. 11*), could take such affidavits. (*Mowry* agt. *Sanborn*, 72 *N. Y.*, 534.)

AGENT.

1. Where, for a long time, agents and their principals had telegraphed and acted upon "exchange accounts," in the absence of fraud and want of notice, the credit and acceptance by telegram of a cer-

tain amount in dispute should be regarded as a payment within the spirit and meaning of judicial authority. (*Bisby* agt. *Drexel*, *ante*, 478.)

2. Where plaintiff was directed by B. B. & Co., his bankers, to reimburse them by a payment to defendants, their receipt of the money (it being within the scope of their authority) creates no obligation on their part to make restitution after they have, in good faith, accounted for and paid over the proceeds of the collection. (*Id.*)
3. Although an action may be maintained against an agent who has received money, to which his principal has no right, a party must be held to some degree of diligence in charging liability upon such agent. He will not be allowed to wait until the agent has parted with the funds and then claim restitution because there was a running account between him and his principals upon which the amount might have been credited. (*Id.*)

See MORTGAGE.

Hemmenway agt. *Mulock*, *ante*, 88.

AGENCY.

1. The defendant, a manufacturer at Fishkill Landing, purchased of the plaintiff, of Meriden, Conn., a heater, agreeing to pay therefor, sixty days after its receipt, by his note at six months, unless the heater should fail to work in such manner as it had been represented that it would, in which case defendant was to be at liberty to return the heater at the end of the sixty days. On the trial of an action, brought for the purchase-price, evidence was given tending to show that one Whitehill, of Newburgh, was an agent of the plaintiff, and that defendant had been directed to go to him for

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any thing pertaining to the heater; that the heater would not work, and was practically useless; that, within the sixty days, the defendant pointed out the defects to Whitehill, and offered to return it; that the latter told him he had better keep it; that he thought the defects could be remedied. Nothing was ever done to correct the defects, nor was any other reply given to defendant's offer to return. Upon the trial, a verdict was directed for the plaintiff:

Held, that this was error; that the case should either have been submitted to the jury, with instructions that, if W. had authority to receive the heater or accept defendant's offer to return it, the latter had done all that he was required to do, and that plaintiff was not entitled to recover, or else the court should have held that Whitehill had such authority, and have directed a verdict for the defendant. (*Waters' Patent Heater Co. agt. Tompkins*, 14 Hun, 219.)

ALIMONY.

1. Where the facts appearing upon an application for alimony *pendente lite* in an action for divorce are such that, on general principles of equity, the wife is not entitled to demand the same, the question as to the granting thereof is one of law, reviewable in this court. (*Collins agt. Collins*, 71 N. Y., 269.)
2. As the allowance is only authorized in favor of a wife, it must be admitted, or proof must be submitted, sufficient to authorize the court to determine that the applicant stands in the relation of wife to the opposite party; and when, in answer to her allegation of marriage, facts are stated showing that the applicant was not competent to contract such marriage, and did not thereby become a wife, as that she was at the time

the wife of another, such facts must be denied, or explained to the satisfaction of the court; if left uncontroverted, the court is not justified in making the allowance. (*Id.*)

3. So, also, where in an action, by the wife, recriminatory charges of adultery are made on the part of defendant, and proofs are presented establishing such allegations, which are not controverted by plaintiff, an allowance is not justified. (*Id.*)
4. As to whether articles of separation, making adequate provision for the support of a wife, are a bar to an application for alimony in an action for divorce, subsequently brought by her; or, as to whether a return of the property received under such articles is necessary, *quære*. (*Id.*)

ANSWER.

1. A defendant on whom process has been improperly served is not bound to seek relief by motion. He is entitled to set up by answer that he is not indebted to the plaintiff, not being the person against whom the plaintiff's alleged claim exists. (*Barney agt. Northern Pacific Railroad Co.*, ante, 23.)
2. Where the plaintiff sued the Northern Pacific Railroad Company for services rendered in 1873, 1874 and 1875, and alleges that defendant was and is a corporation created by an act of congress approved July 2, 1864, and various acts amendatory thereof, the defendant, who claims to be a new and different Northern Pacific Railroad Company, sets forth in his answer, and alleges as a defense, that all the property, rights liberties and franchises belonging to said Northern Pacific Railroad Company (as originally organized) of every kind and description,

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"including its franchises to be a corporation," were sold, pursuant to a decree of the circuit court of the United States, and that said sale was afterwards confirmed by said court, and that the defendant, on whom process has been served, became purchasers at said sale and is the new organization known as the Northern Pacific Railroad Company and was not in existence when the transaction mentioned in the complaint arose, &c.; on demurrer to this defense on the ground that the same is insufficient in law on the face thereof:

Held, that these allegations are averred as matters of fact, and the demurrer necessarily admits these facts. It was not necessary, in order to render the defense available, that it should have been pleaded that process was not served on the old corporation. (*Id.*)

AMENDMENT.

1. Where one of several defendants served with the complaint demurred thereto and the demurrer was noticed for argument, and nearly three months thereafter another defendant was served with the complaint:

Held, that the plaintiff could not amend the complaint, as of course, as to the defendant who had demurred, although the amendment was claimed within twenty days of the time the last complaint was served. (*George* agt. *Grant*, ante, 244.)

2. Section 542 of the Code of Civil Procedure applied. (*Id.*)
3. A separate trial between the plaintiff and one or more defendants may be directed by the court in its discretion. But where there are demurrers interposed by several defendants they should be brought on for trial at the same term (*Code of Civil Procedure*, sec. 967). (*Id.*)

APPEAL.

1. *It seems* that an appeal may be taken from an order confirming the report of a referee as to who was a suitable person to be appointed a committee of the person and estate of a lunatic. (*Matter of Page*, ante, 100.)

2. An order directing an interpleader is appealable. (*Lynch* agt. *St. John*, ante, 144.)

3. Where the general term of New York marine court reverse an order of the special term granting a new trial on the ground that the verdict is against evidence the determination by the general term is conclusive. (*Schwartz* et al. agt. *Oppold* et al., ante, 156.)

4. An order of the general term of the New York marine court reversing an order of the trial judge granting a new trial amounts to an affirmance of the judgment and is, consequently, a final determination by that court sufficient to make the order appealable to the New York common pleas. (*Id.*)

5. On the dismissal of a complaint, after trial at special term, an affirmative finding of fact in favor of the defendant will not be sustained on appeal. (*Brown* agt. *Goodwin* et al., ante, 301.)

6. An appeal will not be dismissed where the printed papers contain the judgment roll and exceptions, although no case is made. (*Palmer* agt. *Ranken*, ante, 354.)

7. On such appeal the court will not review the granting of costs in an equity action tried before a referee, unless the evidence is presented in a case, no matter how strong an equity the facts found make against the propriety of granting costs. (*Id.*)

8. The propriety of granting such

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costs depends upon the evidence which appeared before the referee, and not upon the facts found by his report. (*Id.*)

9. Although the plaintiff substantially succeeds in an equity action, it is not error to allow the costs of the action against him, and the appellate court will not review such question unless the evidence is presented by a case. (*Id.*)

10. Under the Code of Civil Procedure an appeal cannot be taken from an order overruling or sustaining a demurrer. (*Lacustrine Fertilizer Co. agt. Lake Guano and Shell Fertilizer Co., ante, 370.*)

11. The only remedy at the present time is by appeal from the judgment, final or interlocutory, as the case may be, entered upon the decision of law presented by the demurrer. (*Id.*)

12. In this respect the new Code differs from the former one and abrogates the right to appeal from an order of that description which was introduced by an amendment of section 849, adopted in 1851. (*Id.*)

13. The statutes regulating appeals from the general term of the marine court to the court of common pleas entirely assimilate the practice upon such appeals to that governing appeals to the court of appeals. (*McEntee agt. Little, ante, 427.*)

14. The practice of this court should, therefore, be the same as that laid down by the court of appeals, viz., that appeals *must* be dismissed where it appears by the return that questions of fact were legitimately before the general term of the marine court, and that the evidence was such that the court *may* have reversed the judgment on the facts. (*Id.*)

15. Where a trial was had in the ma-

rine court before a judge and jury which resulted in a disagreement of the jury, and on the second trial a verdict was rendered for the plaintiff, and upon an appeal to the general term of the marine court, the case being before the general term in such a form that the exceptions and the evidence all passed under the review of that tribunal, which reversed the judgment and ordered a new trial, with costs to abide the event; on appeal by plaintiff from this decision to the court of common pleas general term:

Held, that the appeal should be dismissed and the plaintiff remitted to her new trial. (*Id.*)

16. A judgment having been recovered by plaintiff in an action to foreclose a mortgage, the appellants, who were defendants therein, being in possession of the premises, appealed from the judgment and procured a stay of proceedings by furnishing an undertaking executed by two sureties, conditioned to pay the rents and profits and waste that might accrue during the pendency of the appeal. The plaintiff having been successful, brought this action against the sureties to the undertaking, and the appellants, who were not parties thereto; the complaint alleging facts showing that the liability of the sureties had become fixed;

Held, that as the appellants were not parties to the undertaking, they were not liable to the plaintiff for a breach thereof, and that as to them the complaint did not contain facts sufficient to constitute a cause of action. (*Delaney agt. Stearns, 14 Hun, 50.*)

17. When an appeal is taken from a determination of a board of supervisors, as to the equalization of assessments for the purposes of taxation, to the board of state assessors, a member of the latter board, who was not present at the hearing, may nevertheless join in

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- the decision of such appeal, and act upon the proofs taken before his colleagues in his absence. (*People ex rel Supervisors agt. Hadley*, 14 Hun, 188.)
18. A *certiorari* to review the decision of the board of state assessors upon such appeal must be applied for by the towns, or the tax-payers thereof, who are injured thereby; it cannot be issued upon the application of the board of supervisors. (*Id.*)
19. Upon an appeal from an order denying a motion for a new trial made upon the minutes of the justice trying the action, it is not necessary that the particular grounds assigned in support of the motion should be specifically mentioned; it is sufficient if it appear from the order that the motion was actually heard and decided. (*Couples agt. Watson*, 14 Hun, 41.)
20. Where an appeal has been taken from a judgment of a justices' court involving questions of law only, and the case has been regularly noticed for argument and placed upon the calendar of the county court the case will remain upon the calendar at subsequent terms without any further notice by either party; but it cannot be brought on for argument at any subsequent term, except by motion, of which at least eight days' notice must be given. (*Matthews agt. Arnold*, 14 Hun, 876.)
21. An appeal lies by the heir at law from a decision of the surrogate, made in proceedings for the sale of real estate for debts, adjudging certain claims to be valid and subsisting demands against the deceased and his estate. (*Owens agt. Bloomer*, 14 Hun, 296.)
22. To enable a party to review the trial of his case by a court or referee, it is only necessary to except to the conclusions of law; facts are not the subject of an exception. (*Roe agt. Roe*, 14 Hun, 612.)
23. An order denying a motion to change the place of trial for the convenience of witnesses is appealable to the general term. (*See Macdonald agt. Macdonald*, 14 Hun, 496.)
24. Exception—necessary to enable appellate court to review the charge on a trial in theoyer and terminer. (*See Brotherton agt. People*, 14 Hun, 486.)
25. An appeal from a decree of a county judge, made upon the final accounting of an assignee for the benefit of creditors, is subject to the rules governing appeals from final judgments rendered by the county court under section 1840 of the Code of Civil Procedure, and to be effectual the security required by section 1841 must be given. (*Matter of Beckwith*, 15 Hun, 826.)
26. Under the Code of Civil Procedure, no appeal lies from an order sustaining or overruling a demurrer. (*Miller agt. Sheldon*, 15 Hun, 220.)
27. The only remedy under such Code is by an appeal from the judgment, whether final or interlocutory, entered upon the decision of the demurrer, and no appeal lies until such judgment is entered. (*Id.*)
28. One who has sought and enjoyed an extension of time within which to comply with a peremptory mandamus, cannot thereafter appeal from the order directing that the mandamus issue. (*People ex rel Garbut agt. Rochester and State Line R. R. Co.*, 15 Hun, 188.)
29. Where there is conflicting evidence upon a question of fact in an action on trial before a referee, a request on behalf of one of the

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- parties to find the fact as claimed by him, and a refusal by the referee, is not the ground of an exception. (*Potter* agt. *Carpenter*, 71 N. Y., 74.)
30. But, where the fact is material, and the referee refuses to make any finding upon the subject, and the court, on motion, refuses to send the case back for a finding as to such question of fact, a judgment of general term, affirming the judgment entered upon the report of the referee, is error. (*Id.*)
31. In such case, on appeal to this court, the judgment of the general term will be reversed, but not the judgment entered on the referee's report; the order will be, that the case be sent back to the referee to pass upon the question of fact; and, when passed upon, the case can be reheard at general term. (*Id.*)
32. In an action to foreclose a mortgage of \$1,100, the only question in controversy was as to the priority of the liens of the mortgage and a judgment against the mortgagor, held by one of the defendants, upon which less than \$300 was due. Upon appeal to this court:
Held, that the amount in controversy was the amount due on the judgment, and that, as this was less than \$500, the judgment below was not appealable. (*Petrie* agt. *Adams*, 71 N. Y., 79.)
33. If the court has the power to direct the payment by the receiver of an insolvent life insurance company of a claim without awaiting the presentation and liquidation of all outstanding claims, it is within its discretion, and the exercise of his discretion is not reviewable here. (*In re People* agt. *Secur. L. Ins. Co.*, 71 N. Y., 222.)
34. Where the facts appearing upon an application for alimony *pendente lite* in an action for divorce are such that, on general principles of equity, the wife is not entitled to demand the same, the question as to the granting thereof is one of law, reviewable in this court. (*Collins* agt. *Collins*, 71 N. Y., 269.)
35. This action was brought against the executor of plaintiff's deceased daughter to recover an advance made by him to her toward the purchase of a farm, and against her husband to whom she had devised the farm, the complaint asking that the advance should be charged as an equitable lien upon the farm. The complaint was dismissed as to the husband, without costs. On appeal by him from that portion of the judgment denying costs, the general term affirmed the judgment charging him with costs:
Held, that costs were in the discretion of the court below, and its decision was not reviewable here. (*Herrington* agt. *Robertson*, 71 N. Y., 280.)
36. Defendant R. was in actual custody under an order of arrest herein when judgment against him and his co-defendants was rendered; execution was issued against the property of the defendants, January 31st, 1876. In September, 1876, a motion by plaintiff to compel the sheriff to return the execution was denied on the ground that he had attachments in his hands against defendants issued prior to the execution, and the attachment suits were undetermined. On motion that plaintiff be required to issue execution against the body of R., it appeared that no property of R. had been attached; that prior to making the motion he served on plaintiff's attorneys a demand that they issue an execution against his body, and a stipulation that charging him in execution should in no way prejudice plaintiff's rights under the prop-

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erty execution. It appeared also that the attachments were still pending. The special term ordered that R. be discharged, unless plaintiff issue execution against his person:

Held, that the special term had power to grant the order, and its discretion in exercising it could not be reviewed here. (*N. Y. G. and I. Co. agt. Rogers*, 71 *N. Y.*, 377.)

37. An appeal from a judgment, restraining action on the part of defendant, and a stay of proceedings thereon, does not affect the validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution; it acts directly without process, and the stay only operates to prevent action on the part of plaintiff. (*Skellh. Ave. R. R. Co. agt. Gil. El. R. R. Co.*, 71 *N. Y.*, 430.)

38. *It seems* that the supreme court, so long as an action is pending therein on appeal from the Special to the general term, has power to enforce obedience to its judgments, and a stay of proceedings pending the appeal does not prevent the exercise of this power. (*Id.*)

39. An order of general term vacating an order requiring a party to show cause upon short notice, why he should not be punished for contempt, in violating an injunction awarded by final judgment, is not appealable to this court. (*Id.*)

40. To proceed upon an order at short notice, instead of upon a notice for the usual and regular term, is not an absolute right. It is in the discretion of the judge at chambers to grant the order to show cause, and within the dis-

cretion of the general term to vacate it and remit the moving party to the usual course of proceeding, and their action in this respect is not reviewable here. (*Id.*)

41. *It seems* that, where the court below refuses to hear and denies the application on the ground of a want of power, and not in the exercise of a judicial discretion, the decision is appealable. (*Id.*)

42. A discharge in bankruptcy of a judgment debtor pending an appeal from the judgment, does not release the sureties to an undertaking in the form required to stay execution, given upon the appeal. (*Knapp agt. Anderson*, 71 *N. Y.*, 466.)

43. *It seems*, that such an undertaking is not included in the provision of the bankrupt act (section 33, *U. S. R. S.*, section 5118) declaring that no discharge granted under the act shall release one liable with the bankrupt for the same debt, as surety or otherwise; this only applies to sureties liable for the debts of the bankrupt existing before, and which would be discharged by the bankrupt proceedings, while the sureties to the undertaking do not become liable for the debt of their principal, and it does not become a debt until the happening of the contingency, i. e., the affirmance of the judgment or dismissal of the appeal. (*Id.*)

44. When an appeal to this court has been dismissed for failure to serve papers, and the *remittitur* has been sent down, judgment entered thereon and execution issued, a motion will not be entertained to reinstate the appeal. (*Jones agt. Anderson*, 71 *N. Y.*, 599.)

45. *It seems* that in such case the appellant should move in the supreme court to have the proceedings there vacated, and the *remittitur*

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- titur* returned here, to the end that he may then make his motion for relief. (*Id.*)
46. Whether a decision of the trial court as to the qualification of an expert to testify as such, is reviewable here *quære*. (*See Nelson agt. Sun Mutual Ins. Co.*, 71 N. Y., 453.)
47. An order of the county court, under the drainage act (*chap. 888, Laws of 1869, as amended by chap. 303, Laws of 1871*), auditing and confirming the accounts of commissioners appointed under said act, is appealable to the general term of the supreme court upon questions of law. (*In re Ryers*, 72 N. Y., 1.)
48. The provisions of said act (*sec. 12*) making the decision of the county court, final, only applies to and makes the order final upon matters of fact. (*Id.*)
49. Such an order is a final order in a special proceeding affecting a substantial right, and so is reviewable here. (*Id.*)
50. To authorize an appeal to this court in a case where the judgment is less than \$500, there must be an order of general term, as prescribed by the act of 1874 (*chap. 322, Laws of 1874*), stating that the case involves some question of law which ought to be reviewed here. An order simply giving leave to appeal, without assigning any cause for so doing, is insufficient. (*Eastable agt. Syracuse*, 72 N. Y., 64.)
51. The question as to the appealability of a judgment under the amendment of 1874 to section 11 of the Code (*chap. 322, Laws of 1874*), is determined by the amount in controversy at general term. (*Brown agt. Sigourney*, 72 N. Y., 122.)
52. Although, therefore, the matters in issue on trial exceed \$500, and the judgment is for more than that sum, if the only controversy at general term is as to an item less than that sum, the judgment is not appealable. (*Id.*)
53. Where upon the trial of an action, after plaintiff has opened his case, the complaint is dismissed on the ground that it does not state facts sufficient to constitute a cause of action, and plaintiff, without asking leave to amend, excepts to the decision and appeals, the complaint will be treated as if it had been demurred to and the sole question presented on appeal is whether it sufficiently states a cause of action. (*Sheridan agt. Jackson*, 72 N. Y., 170.)
54. Where, upon trial before a referee, his decision upon objections to evidence is reserved, and no exception to the mode of treatment is taken, an objection to it cannot be considered upon appeal. (*Holden agt. N. Y. and E. Bank*, 72 N. Y., 287.)
55. The general rule that the findings of a court or referee upon the facts are conclusive upon this court, if there is any evidence to warrant them, applies as well to actions of equity as actions at law. (*Stillwell agt. Mut. L. Ins. Co.*, 72 N. Y., 385.)
56. This court has no power to review an order refusing to set aside as excessive a verdict in an action for slander. (*Hayes agt. Ball*, 72 N. Y., 419.)
57. The authority of the court to permit or refuse a supplemental pleading has not been changed or affected by the new Code (*Sec. 544*). The party must apply to the court for leave, which must be granted, unless the motion papers show a case in which the court may exercise a discretion in granting or refusing leave. When such a case appears, the exercise of this

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discretion is not reviewable here. (*Spears agt. Magor, dec.*, 72 N. Y., 442.)

58. The decision of the general term, reversing proceedings of the board of fire commissioners of the city of New York, removing a clerk, was appealed from as from an order, and was so heard:

Held, that the appeal was from a judgment, and should have been heard as such in its regular order on the calendar, (*People ex rel. agt. Bd. F. Comrs.*, 72 N. Y., 446.)

59. This court cannot review a decision of the supreme court reversing, upon a question of fact, a surrogate's decree on application for the probate of a will. (*Sutton agt. Ray*, 72 N. Y., 482.)

60. This court may, however, on appeal from the judgment of the supreme court, correct any error of law in granting or refusing a new trial in such case (2 R. S., 67, sec. 58). (*Id.*)

61. The only direction or order the supreme court can make upon the reversal is to award an issue to be tried by a jury as directed by the statute (2 R. S., 66, secs. 55, et seq.; *id.*, 609, sec. 98). (*Id.*)

62. Accordingly, *held*, that an order of the supreme court upon reversal of a surrogate's decree on the facts, remitting the proceedings to the surrogate was error. (*Id.*)

63. The commissioner of public works of the city of New York, in pursuance of a resolution and ordinance of the common council, advertised for proposals for a street improvement. The relator was the lowest bidder, and his proposal was accepted. In proceedings by mandamus to compel the commissioner to enter into a contract, *held*, that if the relator established a clear legal right to the contract, he had a remedy at law by action against the city to recover dam-

ages, and so was not entitled as of right to a mandamus; that if the right was not clear, the writ was properly denied on that ground; that, under the circumstances, the granting or refusal of the writ was a matter of discretion in the court below, with the exercise of which this court could not interfere. (*People ex rel. Lunny agt. Campbell*, 72 N. Y., 496.)

64. Where the amount of an extra allowance is, by inadvertence, slightly in excess of the amount allowed by the Code (sec. 309, old Code), this court will not interfere on appeal; the error should be corrected by motion to correct the judgment. (*Kraushaar agt. Meyer*, 72 N. Y., 602.)

65. The provision of the Civil Code (sec. 1808), authorizing an appellate court to require the appellant to file a new undertaking, in case of the insolvency of one of the sureties, is not imperative; if the remaining surety is solvent and abundantly able to satisfy the judgment, or if the judgment is otherwise well secured, and the appeal is likely to be heard and disposed of without delay, the court may, in its discretion, refuse the order. (*Dering agt. Metcalf*, 72 N. Y., 613.)

66. The improper rejection of contested evidence by a surrogate, on probate of a contested will, will not call for reversal of his decree, if it appears that the result would not have been changed by the evidence. (*Horn agt. Pullman*, 72 N. Y., 269.)

67. When matter not set up as a defense, or relied upon on trial, is not available on appeal. (*See Dewey agt. Moyer*, 72 N. Y., 70.)

68. When proper for general term, on reversal of order of special term, to make such order as should have been made below. (*See Griffin agt. Helmbold*, 72 N. Y., 437.)

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60. When error in reception of evidence not cured by motion of party in whose favor it was received to strike it out. (*See First agt. Second Ave. R. R. Co.*, 72 N. Y., 542.)

ARBITRATION.

1. A submission to arbitrators of an action pending between the parties to the submission, and of "all other actions or causes of action," and of "all other matters in controversy," is a general submission of all questions and controversies between the parties. (*Jones agt. Welwood*, 71 N. Y., 308.)
2. Where a submission is full and general of all matters in question between the parties and the intent appears to have every thing decided if any thing is, a decision of all matters submitted will be imperatively required to validate the award, and an award determining a part only, is void. (*Id.*)
3. The omission to insert in the submission, in express terms, an "*ita quoad*" clause, does not make a partial award valid. (*Id.*)
4. In cases of doubt, the presumption is in favor of an intention that all matters should be decided. (*Id.*)
5. The parties to an arbitration have the right to submit only a portion of the subjects involved, and an award will not be set aside for not including matters not brought to the attention of the arbitrators. (*Id.*)
6. *It seems*, however, that a partial award in any case will only be sustained when the matters omitted are not necessarily dependent upon and connected with the other points. (*Id.*)

ARBITRATORS.

1. An award of arbitrators should not be set aside where the plain-

tiffs, with full knowledge of the situation and of the action of the arbitrators, accepted the fruits of, and executed, the award. (*De Castro agt. Brett*, ante, 484.)

2. The supreme court has no general supervisory power over awards of arbitrators, and where the arbitrators keep within their jurisdiction their awards, in the absence of corruption or misconduct, will not be set aside for error of judgment either in law or in fact. (*Id.*)
3. Awards may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures, or for an error of law appearing on the face of the award, *i. e.*, where it appears that the arbitrators intended to decide according to law, but through mistake as to the law did not. (*Id.*)
4. The party alleging error, in order to sustain his action, must be able to show, from the award itself, that but for the mistake the award would have been different. (*Id.*)
5. Although the arbitrators may have misunderstood the effect of their award, yet where the evidence does not justify the conclusion that they were actuated by any other purpose than that of doing justice between the parties, or that they were guilty of corruption or misconduct in making the award, the award will not be vacated. (*Id.*)

ARREST.

1. Under the Code of Civil Procedure an order of arrest may be obtained in two classes of cases: *First*, in those where the cause of action is identical with the cause of arrest, and *second*, in those where facts extrinsic to the cause of action constitute the cause of arrest. In the latter class of cases it is improper to allege in the

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complaint those extrinsic facts. (*Bovary National Bank agt. Duryea, ante, 42.*)

2. To justify the vacating of an order of arrest under the last clause of section 558 of the Code of Civil Procedure, it must *affirmatively* appear by the complaint that the cause of action is such that in no event could the defendant be arrested within the provisions of either section 549 or 550 (*Affirming S. C., 55 How., 88.*) (*Id.*)

3. An application by an imprisoned judgment debtor for his discharge, under article 6, title 1, chapter 5, part 2, Revised Statutes, will be denied, where it appears that a few days after his arrest he was adjudged a bankrupt, on his own petition. Such party cannot put it out of his power to obey the orders of the state court, and then ask that court to discharge him from imprisonment. (*Matter of Fitzgerald, ante, 190.*)

4. But if it should appear that, without any fault on his part and against his will, all the property which he had at the time of his arrest had been taken away from him, whilst imprisoned, the court would not refuse him a discharge. (*Id.*)

See COMPLAINT.

Combs agt. Dunn, ante, 169.

5. In an action upon contract it is not necessary to authorize the court to grant an order of arrest on account of fraud in the contracting thereof, that the facts upon which such order is granted should be stated in the complaint. (*Taylor agt. Fuas, 14 Hun, 166.*)

6. The defendant Horwitz having been arrested in an action brought to recover possession of personal property, an undertaking was given, conditioned that he should be at all times answerable to process, "and for the payment to the

plaintiff of such sums as may, for any cause, be recovered against the defendant." Upon plaintiff's objection that the undertaking was not such as was required by section 211 of the Code, a new undertaking was given, conditioned for a return of the property as required by the Code. Plaintiff, having recovered a judgment, brought this action against the sureties to the first undertaking:

Held, that, as it was not in the form required by the statutes, it was void, and could not be enforced. (*Cook agt. Horwitz, 14 Hun, 542.*)

7. *Semble*, that the second undertaking was valid; and that, as it recited that Horwitz had been arrested, the sureties were estopped from denying that he was under arrest, and that the bond was given to release him therefrom. (*Id.*)

8. This action was brought to recover the price of certain lumber sold to the defendants, who were partners, and for work performed for them. An affidavit, used to procure an order of arrest, alleged that one of the defendants had falsely represented that their firm was fully responsible, when, in fact, it was insolvent; that shortly before these representations were made, each of the partners conveyed certain lands of the value of \$6,000 to their wives, without consideration; that the deeds were not recorded until four months after the making of the representations, and that the conveyances were made to cheat the creditors of the defendants; that the concealment thereof was to cheat and defraud the plaintiffs, and that each partner ordered some of the items of the bill, knowing at the time that they were insolvent.

Held, that the affidavit showed facts, independent of the false representations, sufficient to sustain an order of arrest against both partners. It is not necessary

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that the affidavits should specify the grounds of the arrest in terms; it is enough that they state facts sufficient to authorize the conclusion that the grounds exist. (*Hitchcock* agt. *Peterson*, 14 *Hun*, 389.)

9. *Semble*, that the action being on contract and not for the wrong, the partner not making the false representation was not liable to arrest for the false representation made by his co-partner, without his knowledge, authority or ratification. (*Id.*)
10. The word "property," as used in subdivision 2 of section 549 of the Code of Civil Procedure, which authorizes the granting of orders of arrest in actions "to recover damages * * for an injury to property, including the wrongful taking, detention or conversion of personal property," includes an injury to real as well as personal property, and an order of arrest may be granted in an action of trespass brought under section 4 of 2 Revised Statutes, 838, to recover damages for a forcible ejectment. (*Welch* agt. *Winterburn*, 14 *Hun*, 518.)
11. Where the cause of action set forth in the complaint and the ground of arrest are the same, the controversy should be left to an investigation at a regular trial, and should not be decided upon conflicting affidavits on a motion to vacate the order of arrest. (*Id.*)
12. The plaintiff commenced an action against the defendant before a justice of the peace, and applied for a warrant of arrest, alleging in his affidavit that the defendant was a non-resident of the county, and that plaintiff "has, as he verily believes, a good cause of action against Samuel Sisson, for wrongful and fraudulent representations in the exchange of horses, by which this deponent was damaged to a large amount." *Held*, that the affidavit did not
- state facts, as required by the statute; that plaintiff's belief that he had a good cause of action was not sufficient to authorize the justice to issue the warrant. (*Wells* agt. *Sisson*, 14 *Hun*, 267.)
13. The complaint in this action alleged the sale of goods by the plaintiffs to the defendant; that the sale of a portion of them was procured by his fraudulent representations, and that since the contracting of the debts the defendant had disposed of his property with intent to defraud his creditors. Upon the complaint and affidavits, an order of arrest was granted, on the ground that defendant had disposed of his property with intent to defraud his creditors. *Held*, that although, if the order had been granted on account of the fraudulent representations, it could not be sustained, as the plaintiffs sought to recover for the sale of other goods not procured by them; yet as it was granted for a cause applicable to the whole claim, it was proper, and should be affirmed. (*Bassett* agt. *Pitts*, 15 *Hun*, 464.)
14. The defendant was arrested under an execution issued on a judgment, whereupon he noticed a motion to set aside the arrest, on the ground that he had not been arrested on an order before the entry of the judgment. The plaintiff, without waiting for the decision of the motion, consented to his release, upon his agreeing not to bring an action for false imprisonment. *Held*, that the consent of the plaintiff to his release did not amount to a satisfaction of the judgment. (*Rosse* agt. *Guilleaume*, 15 *Hun*, 462.)
15. Defendant R. was in actual custody under an order of arrest herein when judgment against him and his co-defendants was rendered; execution was issued against the property of the de-

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fendants, January 31st, 1876. In September, 1876, a motion by plaintiff to compel the sheriff to return the execution was denied on the ground that he had attachments in his hands against defendants issued prior to the execution, and that the attachment suits were undetermined. On motion that plaintiff be required to issue execution against the body of R. it appeared that no property of R. had been attached; that prior to making the motion he served on plaintiff's attorneys a demand that they issue an execution against his body, and a stipulation that charging him in execution should in no way prejudice plaintiff's rights under the property execution. It appeared also that the attachments were still pending. The special term ordered that R. be discharged, unless plaintiff issue execution against his person.

Held, that the special term had power to grant the order, and its discretion in exercising it could not be reviewed here. (*N. Y. G. and I. Co. agt. Rogers*, 71 *N. Y.*, 377.)

16. The implied prohibition of the Code against issuing a body execution, until the return of a property execution unsatisfied, is for the benefit of the judgment debtor, and may be waived by him. (*Id.*)

17. It is not a conclusive answer to an application under section 288 of the Code, by one of several judgment debtors imprisoned under an order of arrest, for a discharge from imprisonment because of neglect to issue a body execution within three months after judgment, that there is good reason for not returning the property execution owing to circumstances affecting his co-defendants only. (*Id.*)

18. Where a plaintiff unites in his complaint two causes of action, one of which is bailable and the

other not, he waives his right to bail as to both, and an order of arrest cannot be sustained. (*Madge agt. Puig, impleaded, etc.*, 71 *N. Y.*, 608.)

19. Where an undertaking, given under the old Code (*sec.* 187) to procure the discharge of a defendant from arrest, was, by its terms, simply a joint obligation, not joint and several, *held*, that upon the death of a surety thereto, his estate was absolutely discharged, both at law and in equity, and the surviving obligors only were liable. (*Davis agt. Van Buren*, 72 *N. Y.*, 587.)

ASSESSMENTS.

1. Under the provisions of chapter 137 and 383 of the Laws of 1870, a resolution passed by the common council authorizing a specific improvement, which was passed without a three days' prior publication, as required by section 20 of chapter 137, is illegal and an assessment founded thereon void; and the fact that the mayor and comptroller failed to designate papers in which the city advertising should be done, as they were required to do by section 1, chapter 383 of such laws, and in consequence there was no paper in which the advertising could legally be done, does not excuse a non-compliance with section 20 of chapter 137, or make such resolution and assessment valid. (*Matter of Burmeister*, *ante*, 416.)

2. The object of requiring publication is to give notice to taxpayers of proceedings which may affect their interests. It is a substantial requirement, and the statute is prohibitory. If there are no corporation papers the common council cannot act or take the first step. (*Id.*)

3. The certificate of the commissioners under the act chapter 580,

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- Laws of 1872, has no effect upon the rights of *parties* to vacate assessments under the exception contained in the seventh section of that act. These provisions relate to the validity of the contracts and bind those, and those *only*, who were parties to the contracts and to the proceedings. They affect the city and the contractors and *no one else*. (*Id.*)
4. The words "paving" and "repaving," as employed in the acts of 1873 and 1874, include the sidewalks, the crosswalks, the curb and gutter stones and the carriageway. The work of setting curb and gutter stones and flagging the sidewalk which, in this case, had once been done and paid for, was a repavement of the street within the meaning of the exception contained in the seventh section of the act of 1872. (*Id.*)
 5. A street includes sidewalks and gutters, and when the legislature used this general term in the act of 1872 they intended to embrace the *whole street and every kind of paving*. (*Id.*)
 6. The construction of an underground drain in the city of New York through private property without the consent of the owner, and without any compensation being awarded to him for the easement acquired in his lands, is unauthorized and an assessment therefor will be vacated and set aside. (*Matter of Chesebrough, ante*, 460.)
 7. Nor can the assessment be maintained on the ground of its being a sanitary measure, the health department, through its proper officer, having certified as to the necessity for building the drains for the protection of the public health in accordance with the provisions of chapter 566 of the Laws of 1871. (*Id.*)
 8. The construction of drains as a sanitary measure, cannot be undertaken or sustained without making just compensation to the owner for the easement thereby acquired in his lands. (*Id.*)
 9. Where *substantial error* is shown, in this class of cases, the petitioner may have relief in this form of proceeding, under the provisions of chapter 312 and 313 of the Laws of 1874, and it is not necessary to show *actual fraud*. (*Id.*)
 10. A mere neglect to physically resist an illegal or unconstitutional exercise of an alleged power on the part of the state or of the municipal authorities, does not deprive the individual, when a right is claimed under such illegal or unconstitutional action, from insisting upon his rights. (*Id.*)
 11. Whether the doctrine of *laches* applies to legal rights or should be restricted in its application to equitable rights only, *quære?* (*Id.*)
 12. Where a complaint in an action to vacate an assessment as a cloud upon title, alleges two grounds upon which relief is claimed, one of which is good and sufficient, the complaint is not demurrable because of the insufficiency of the other; the allegations as to the latter will not vitiate or detract from the effect of the allegations as to the former. (*Boyle agt. City of Brooklyn*, 71 N. Y., 1.)

ASSIGNEE.

1. An assignee of a judgment has the right to maintain supplementary proceedings on it, after the death of the party recovering the judgment. (*Orill agt. Kornmeyer, ante*, 276.)
2. Where it appeared that the owner of the judgment was B., and that it was assigned to him by the plaintiff in his lifetime, it also

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appearing that the plaintiff in the action was dead:

Held, that the court could appoint a receiver of the property of the defendant on the application of the assignee. (*Id.*)

ASSIGNEE IN BANKRUPTCY.

1. An assignee in bankruptcy will not be compelled to file security for costs on the ground that there are not funds belonging to the bankrupt's estate, represented by him, sufficient to pay said costs if defendant should succeed in the action. (*Wilbur* agt. *White*, ante, 321.)
2. Nor is he, under section 817 of the old Code, personally liable for costs, except where guilty of misconduct or bad faith (*See, to same effect, memorandum by VAN HORNEN, J., N. Y. common pleas, in Hall, assignee, agt. Waterbury, January, 1879.*) (*Id.*)

ASSIGNMENT.

1. An order for the examination of witnesses and the production of any books and papers by any party or witness under section 21 of the act of 1877, chapter 466, may be had at any time, and is not necessarily confined to cases where a proceeding under the act is pending. (*Matter of Assignment of Bryce & Smith to Lewis*, ante, 359.)
2. It is not necessary to allege or prove a demand and refusal of inspection in the petition. (*Id.*)
3. An inspection, without an order made on petition, gives no right to file with the county clerk extracts from the books, nor to use them in proceedings under the act. An order must be obtained for the purpose and the application for it involves no reflection upon the assignee. (*Id.*)

4. When a limited partnership becomes insolvent, its assets are a special fund for the payment of its debts ratably (except those due to the special partners), and any creditor, although he has not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver. (*Whitcomb et al. agt. Fowle et al.*, ante, 365.)

5. Where a limited copartnership made an assignment for the benefit of its creditors, in which the amount due the special partner was made a preferred claim, and subsequently an action was commenced by plaintiffs to have the assignment declared null and void; that a receiver be appointed, and for an injunction restraining any disposition of the property; pending this action, the assignee reassigned the copartnership property to the assignors, who then made an assignment to the same assignee without preference, who filed the schedule required by law, and executed a bond which was duly approved:

Held, that, although the authorities would seem to establish the theory that as between the parties to it, the assignment is binding and revokable at their pleasure, yet such a revocation could in no way prejudice or impair the rights of creditors. They had already commenced proceedings to protect their rights upon a statement of facts which should not be decided on affidavits. (*Id.*)

6. If plaintiffs have asked for more or greater relief than the court can afford them on a final judgment, that is no reason why the court on a mere motion should try issues on the determination of which they may be entitled to some relief. (*Id.*)

7. One Rogers, the assignee for the

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benefit of the creditors of one Nicholas, applied, by petition, to the supreme court for, and procured an order appointing, a referee to take and state his accounts. Upon the coming in of the referee's report, the assignee was directed to sell the interest of the debtor in certain lands in Pennsylvania, and subsequently, upon a report being made showing the disposition made of the proceeds of the sale, the assignee was discharged.

Held, that under chapter 466 of 1877, as amended by chapter 318 of 1878, the entire original jurisdiction over these proceedings, by petition, was conferred upon the county court, and that the supreme court had no authority or jurisdiction to make the orders appealed from, and that the same were therefore void. (*Matter of Nicholas*, 15 Hun, 317.)

8. Ackerman & Son, who were at the time engaged in repairing a house for the defendant, who was then indebted to them to the amount of about \$300, gave to plaintiffs the following instrument:

"MOHAWK, August 31, 1876.

"Jerome Tuttle: Pay Brill and Russell three hundred dollars, and charge the same to our account, for labor and materials performed and furnished in the repairs and alterations of the house in which you reside in the village of Mohawk. J. P. ACKERMAN & SON."

Held, that this did not constitute an equitable assignment of any money which might be due from the defendant to Ackerman, as there was no specification of any particular fund out of which it was to be paid. (*Brill* agt. *Tuttle*, 15 Hun, 289.)

9. A party having a cause of action, in its nature not assignable, cannot, by any agreement before judgment or a verdict thereon, give his attorney any interest therein. (*Coughlin* agt. *N. Y. C.*

and *H. R. R. R. Co.*, 71 N. Y., 448.)

10. *It seems*, that when a cause of action is in its nature assignable, the owner may assign to or by agreement create legal and equitable interests therein in favor of his attorney, which the opposite party having notice thereof must respect. (*Id.*)

ASSUMPTION OF MORTGAGE.

1. Where M. conveyed to F. certain lands, subject to a mortgage, which, by the covenants in the deed, F. agreed to assume and pay, but an agreement was made, contemporaneous with the deed, that M. would take back the land, at any time, should F. become dissatisfied with the purchase, and release F. from the covenants, and F. afterwards reconveyed the land to M., who released him from the covenants in the original deed:

Held, that the release of M. to F. discharged him from all claim to pay the mortgage, and that the holder thereof was not entitled to a judgment against F., for any deficiency arising on a sale, in an action of foreclosure (*See Flagg* agt. *Munger*, 5 Seld., 483; *Crowell* agt. *St. Bernards*, 27 N. J. E., 650; but, see *Whiting* agt. *Gearty*, 14 Hun, 498, note at end of case). (*Devlin* agt. *Murphy*, ante, 326.)

2. Where the consideration expressed in a deed of conveyance of land was the sum of \$15,000, but the deed contained a clause in these words: "subject, however, to the assumption as a part of the consideration," of the conveyance, of a mortgage upon the land:

Held, that the language of the deed amounted to an agreement on the part of the grantee to pay the mortgage. (*Douglass* agt. *Cross*, ante, 330.)

8. *Collins* agt. *Rowe* (1 Abb. N. C., 97), distinguished. (*Id.*)

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4. Where a husband purchased land, incumbered by a mortgage, and directed that the deed be made out in the name of his wife, he intending to make her a gift of the land; the deed contained a covenant, on the part of the grantee, to pay the mortgage; the wife was, however, ignorant of the transaction, and had no knowledge of the deed or its covenant; it appearing that the husband paid, with his own funds, the consideration on the purchase, and, in like manner, discharged the taxes and assessments:

Held, that the wife, on a foreclosure of the mortgage, was not liable for any deficiency arising on the sale. (*Munson agt. Dyett, ante*, 333.)

5. Although a married woman may enter into engagements with respect to her separate estate, there is nothing in the marital relation which authorizes a husband, without his wife's knowledge or assent, to create an estate in lands in her and charge her personally with a covenant in respect thereto. (*Id.*)

6. Where the grantor in a deed is not himself liable to pay a mortgage upon the land, his grantee is not liable to pay the same to the holder thereof, although, by the conveyance to him, he assumes its payment. A promise to pay an incumbrance, of which the holder can take advantage, must be made to one who is liable to pay. (*Id.*)

ATTACHMENT.

1. Chapter 152 Laws of 1844 provides for the construction of a penitentiary in the county of Albany. Section 4 provides: "The management and direction of said penitentiary, when completed, shall be under the control and authority of the said board of supervisors and the said mayor and recorder of the city of Albany,

who are hereby authorized and empowered, by their votes in joint meeting, to establish and adopt rules for the regulation and discipline of said penitentiary, to appoint officers to take charge thereof, to fix their compensation and prescribe their duties and generally to make all such by-laws and ordinances, in relation to the management and government thereof, as they shall deem expedient."

At a joint meeting * * * "of the board of supervisors of the county of Albany and the mayor and recorder of the city of Albany, a committee, consisting of five supervisors and the mayor and recorder aforesaid, were charged with an investigation into the effects and consequences of convict labor in the penitentiary, and, to that end, to send for persons and papers, to take evidence under oath and * * * to report to this board the result of their labors, together with such recommendations as the inquiry may commend to their judgment, at as early a day as practicable." The application for attachment against the superintendent of the Albany penitentiary to compel him to give evidence and produce his books and papers before such committee, he having refused so to do, is made upon certain provisions of the Revised Statutes (pages 879, 880 of vol. 1, 6th edition), sections 44, 45, 46, 47 and 48 providing for the examination, by the board of supervisors, of any county, of any officer of the county or any person or witness upon any subject or matter within the jurisdiction of said board:

Held, first, that the witness was not required to attend either by or before the board of supervisors, or by or before any committee of such board. The committee, before which the witness was summoned, was not appointed by the board of supervisors, when convened as such, but was one appointed by "the board of supervisors of the county of Albany

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and the mayor and recorder of the city of Albany, in joint meeting," assembled. The application must fail because no committee of the board of supervisors, appointed by the board, nor any committee consisting of supervisors only, appointed at a joint meeting, or anywhere, has required the witness' attendance before it. (*Matter of Pilsbury, ante, 291.*)

2. *Second.* Even if the committee, appointed "in joint meeting," or the supervisors alone who formed a majority of it, could be called a committee of the board of supervisors, and the right to summon the witness be founded upon the clause in the section of the statute (1 R. S. [6th ed.], p. 879, sec. 44), which provides for his examination "upon any subject or matter within the jurisdiction of such board," the application for the attachment must be denied, for the reason that section 4 of chapter 153 of the Laws of 1844 places "the management and direction of the said penitentiary, when completed, * * * under the control and authority of the said board of supervisors and the said mayor and recorder of the city of Albany;" and, therefore, the "subject or matter" is not "within the jurisdiction of such board" of supervisors. (*Id.*)

3. *Third.* He cannot be examined under the clause of section 44, giving the board of supervisors or its committee the right to examine "any officer of the county" as he is no county officer. (*Id.*)

4. *Fourth.* Nor can he be compelled, under section 44, to produce "any book, account, voucher or document" which such committee may need as "relating to the affairs or interests of such county." Such book, account, voucher or document "must relate" to the affairs or interests of such county. Although, in some sense, the documents sought might be considered

as relating "to the affairs or interests" of the county of Albany, yet the better and safer construction seems to be, that the limits upon the oral testimony apply to the written, and that the "affairs or interests" spoken of are those over which the board of supervisors, as such, exercise control. The subject (*convict labor in prisons*) the board of supervisors, as such, have no control over.

Held, further, that the application for an attachment against the superintendent of the Albany penitentiary cannot be granted, for the reason that he has not been subpoenaed by or before any board of supervisors, or by or before any committee of such board, and also because even though the committee summoning him could be called a committee of the board of supervisors, a case is not made out under the statute. (*Id.*)

5. *Quære.* Can the legislature confer upon the board of supervisors, or a committee thereof, such general and sweeping powers as the statute in words seeks to confer? (*Id.*)

6. A plaintiff cannot, on a motion to vacate an attachment, introduce new proof to sustain or fortify the grounds upon which it was issued, where the motion is founded upon the papers upon which the warrant was granted. (*Steuben County Bank agt. Alberger, ante, 345.*)

7. Where the motion to vacate was made by a lienor or judgment creditor upon an affidavit setting out her judgment, &c., upon the ground of alleged insufficiency of the original affidavits upon which the attachment was granted:

Held, that the fact of the lienor having made an affidavit showing the existence of her lien, which was attached to the motion papers and referred to in the notice of motion, did not make the motion

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- one "founded upon proofs, by affidavit on the part of the defendant," within the meaning of section 638 of the Code of Civil Procedure, so as to entitle the plaintiff to support the attachment by new affidavits (*Reversing S. C.*, 55 *How.*, 481). (*Id.*)
8. The facts that a debtor is insolvent, that he has turned over to two creditors portions of his goods amounting to less than one-half of their respective debts; that he refuses to turn over any goods to the plaintiffs or to pay the amount due to them; that he is selling off his stock in trade, and not likely to continue his business, do not furnish sufficient evidence to authorize a justice of the peace to issue a warrant of attachment against him, on the ground that he has disposed, or is about to dispose, of his property, with intent to defraud his creditors. (*Horton agt. Fancher*, 14 *Hun*, 172.)
9. An attachment cannot be issued against a national bank before final judgment, even though it has property within this state, and is located and carries on business in another state. (*Rhoner agt. First National Bank*, 14 *Hun*, 126; *Pulmer agt. The Same*, 14 *Hun*, 126.)
10. Where a motion to set aside an attachment, issued upon an affidavit only, is made upon the affidavit upon which it was granted, and also upon the complaint, the plaintiff is entitled, upon the hearing, to read additional affidavits in support of the attachment. (*Ives agt. Holden*, 14 *Hun*, 402.)
11. In the absence of fraud or collusion, any irregularity in the issuing of an attachment, which is waived by the debtor, cannot be taken advantage of by a subsequent attaching creditor. (*Jacobs agt. Hogan*, 15 *Hun*, 197.)
- Summons must be served within thirty days from the issue of a warrant of attachment in an action, or the levy thereunder is void. (*See Kelly agt. Countryman*, 15 *Hun*, 97.)
- Right of the sureties of an administrator, to take an assignment of a surrogate's decree against their principal and enforce it by attachment. (*See Townsend agt. Whitney*, 15 *Hun*, 93.)
- Bailable attachment, returnable before the court, should be issued for the purpose of collecting the costs of an action from one taking, after the commencement of the action, an assignment of the cause thereof. (*See Morrison agt. Lester*, 15 *Hun*, 538.)
12. Upon an attachment issued in this action, the sheriff seized certain property; by consent of the parties interested, an order was obtained providing that the sheriff should proceed to sell by an auctioneer named, "and hold the proceeds thereof in the same manner as the property sold subject to the existing rights of all parties therein." In pursuance of the order the sheriff sold and rendered his account, which was settled, save as to items charged for auctioneer's fees, which were objected to as excessive:
- Held*, that an order was proper taxing the items and requiring the sheriff to pay over the difference between the amount so allowed on taxation and that retained, although the money did not actually come into his hands; that it was to be presumed that he assented to the order naming the auctioneer, as neither the court nor the parties could compel him to employ an auctioneer, or could name one whom he should employ without his consent; that the auctioneer was his agent, and for moneys coming into the hands of such agent he was responsible; and that this was a proper case for taxation under the provision of the statute on that subject (2 *R. S.*, 652, *sec.* 1).

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(*Griffin* agt. *Helmbold*, 72 N. Y., 437.)

13. Also *held*, that there having been no agreement for the compensation of the auctioneer, the sheriff had no right to allow beyond the two and one-half per cent fixed by statute (1 R. S., 532, sec. 23). (*Id.*)

ATTORNEY.

1. Where, under section 65 of the Code of Civil Procedure, notice to appoint another attorney is served upon a party, whose attorney has died, all proceedings are stayed for thirty days, and a motion to dismiss an appeal for a failure to appoint an attorney, made within that time, is premature. Where there is more than one party, both must be notified. (*Hickox* agt. *Weaver*, 15 Hun, 875.)
2. *Seem*, that, under section 1302 of the Code of Civil Procedure, the respondent may proceed in the same manner as it is therein provided that the appellant may. (*Id.*)
3. In an action for negligence, one of plaintiff's attorneys was called as a witness in his behalf, and gave material testimony. Upon cross-examination he testified that his compensation depended in some degree upon the result of the action. He was then asked "to what extent?" This was objected to and objection sustained:
Held, no error. (*King* agt. *N. Y. C. and H. R. R. Co.*, 72 N. Y., 608.)
4. In action for services, defense that action of plaintiff was simply as friend, and in mutual interchange of friendly services, is proper. (*See Young* agt. *Hunt*, 72 N. Y., 604.)
5. When action against, for misconduct, cannot be sustained. (*See Jaquiss* agt. *Hagner*, 72 N. Y., 605.)

ATTORNEY'S FEES.

See REFERENCE.

Perry agt. *Rollins*, *ante*, 242.

ATTORNEY AND CLIENT.

1. To authorize an action under 2 Revised Statutes, 287, section 68, giving an action against an attorney, counselor or solicitor, for any deceit, with intent to deceive the court, or a party, it is not necessary that the acts of the attorney should be such as to constitute a common law or statutory cheat. (*Loof* agt. *Lawton*, 14 Hun, 588.)
2. An attorney who knowingly misleads the court or a party is guilty of a criminal deceit under the statute. (*Id.*)
3. An attorney who advises ignorant adult owners of land that they are not competent to convey it, and thereby induces them to employ him to institute a suit in partition, and incur the expenses thereof, for the purpose of affecting a sale of the lands, misleads and deceives them within the meaning of the statute. (*Id.*)
4. The defendants, a firm of attorneys, being engaged in preparing for trial a case which involved the settlement of an extended partnership, employed the plaintiff to examine the partnership books; it being necessary to do this in order to prepare the case for trial. Upon the trial of an action brought by him against the firm, to recover the value of his services, the defendants requested the court to charge that if the defendants employed the plaintiff to perform the services under authority from their client, and the plaintiff had knowledge that the employment was for their client, then the plaintiff could not recover:
Held, that the court should have

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granted the request, and erred in refusing so to charge (*Covell* agt. *Hart*, 14 *Hun*, 252.)

5. Every communication made to an attorney or counselor by a client, for the purpose of getting advice as to the law applicable to the facts so stated, is privileged. (*Bacon* agt. *Friedie*, 15 *Hun*, 26.)

6. A party having a cause of action, in its nature not assignable, cannot, by any agreement before judgment or a verdict thereon, give his attorney any interest therein. (*Coughlin* agt. *N. Y. C. and H. R. R. Co.*, 71 *N. Y.*, 444.)

7. A settlement between the parties and a release of such a cause of action is a bar to an action commenced thereon, although by agreement between the plaintiff and his attorney at the commencement of the action the latter was to receive a share of any recovery therein for his services, and although the defendant had notice of the agreement the defendant is not bound to care for the interests of the attorney; nor will the court intervene and allow the action to be prosecuted for the sole purpose of enabling the attorney to reap the benefits of the agreement. (*Id.*)

8. The provisions of the Code (*sec.* 303) abolishing statutes and rules in relation to attorneys' fees, and leaving their compensation to be fixed by agreement between them and their clients, has not abrogated the provisions of the Revised Statutes (2 *R. S.*, 288, *secs.* 71, 72) prohibiting attorneys from buying claims for prosecution, or from advancing or agreeing to advance moneys, &c., to any person as an inducement to, or a consideration for, the placing in his hands of a claim for collection. (*Id.*)

9. An attorney may stipulate with his client for any agreed compen-

sation, and may make it absolute or contingent, but he cannot advance or agree to advance the money needed to carry on a prosecution as an inducement to the placing of a claim in his hands for prosecution. (*Id.*)

10. Accordingly, *held*, where one having a claim against a railroad corporation for damages resulting from negligence accepted the proposition of attorneys that they would take the claim for collection, pay all expenses attending its prosecution and divide the recovery, and where after service of summons, defendant, having notice that the attorneys had an interest in the cause of action, settled with plaintiff and obtained a release, that the release was a bar to the action; and that the attorneys could not prosecute it, to give them the benefit of the agreement. (*Id.*)

11. *It seems*, that when a cause of action is in its nature assignable, the owner may assign to, or by agreement create legal and equitable interests therein in favor of his attorney, which the opposite party having notice thereof must respect. (*Id.*)

AWARD.

1. An award of arbitrators should not be set aside where the plaintiffs, with full knowledge of the situation and of the action of the arbitrators, accepted the fruits of, and executed, the award. (*De Castro* agt. *Brett*, *ante*, 484.)

2. The supreme court has no general supervisory power over awards of arbitrators, and where the arbitrators keep within their jurisdiction their awards, in the absence of corruption or misconduct, will not be set aside for error of judgment either in law or in fact. (*Id.*)

3. Awards may be set aside for a

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palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures, or for an error of law appearing on the face of the award, i. e., where it appears that the arbitrators intended to decide according to law, but through mistake as to the law did not. (*Id.*)

4. The party alleging error, in order to sustain his action, must be able to show, from the award itself, that but for the mistake the award would have been different. (*Id.*)

5. Although the arbitrators may have misunderstood the effect of their award, yet where the evidence does not justify the conclusion that they were actuated by any other purpose than that of doing justice between the parties, or that they were guilty of corruption or misconduct in making the award, the award will not be vacated. (*Id.*)

6. Where a submission is full and general of all matters in question between the parties, and the intent appears to have every thing decided if any thing is, a decision of all matters submitted will be imperatively required to validate the award, and an award determining a part only, is void. (*Jones* agt. *Welwood*, 71 N. Y., 308.)

7. The omission to insert in the submission, in express terms, an "ita quoad" clause, does not make a partial award valid. (*Id.*)

8. In cases of doubt, the presumption is in favor of an intention that all matters should be decided. (*Id.*)

9. The parties to an arbitration have the right to submit only a portion of the subjects involved, and an award will not be set aside for not including matters not brought to the attention of the arbitrators. (*Id.*)

10. It seems, however, that a partial award in any case will only be sustained when the matters omitted are not necessarily dependent upon and connected with the other points. (*Id.*)

BAIL.

1. A person arrested on a warrant issued on an indictment found in any court of criminal jurisdiction may be let to bail under section 56 of 2 Revised Statutes, 728, by any justice of the supreme court of this state, provided it shall appear that the court having cognizance of the offense and jurisdiction to try the same is not sitting at the time the application for bail is made. (*People* agt. *Clews*, 14 Hun, 90.)

2. Where a plaintiff unites in his complaint two causes of action, one of which is bailable and the other not, he waives his right to bail as to both, and an order of arrest cannot be sustained. (*Madge* agt. *Puig, impleaded, etc.*, 71 N. Y., 608.)

BANK.

1. Knowledge by one officer of a bank that such representations were false binds the bank, though such officer represents to the bank that such representations are true. (*Gould* agt. *Cayuga County National Bank*, ante, 506.)

2. On the facts stated: *Held*, that the officers of the bank had the means of ascertaining whether plaintiff's bonds had been replaced. The vault was under their control, and it was the proper place to deposit the bonds if they had been returned. (*Id.*)

3. That S., having told the president and other officers that he had returned the bonds, and such statement being false, does not excuse

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the bank from liability on a claim of an outside party. (*Id.*)

4. The bank cannot escape the consequences of a false representation made to a person dealing with it, and who, by relying on it is injured, by proving that its officers, or some of them, were told the falsehood by some other agent or officer of the corporation. (*Id.*)
5. The party has the right to rely upon the representation as being matter within the personal knowledge of the person making it, unless the source from which the information was obtained was disclosed to him before he entered into the contract. (*Id.*)
6. Plaintiff had the right to assume that the person making the representation as to the return of his bonds had personal knowledge of the fact; and especially had he the right to assume they were not making it upon the faith alone of the cashier, S. It cannot be doubted but that the representations influenced plaintiff. (*Id.*)

BANKRUPTCY.

1. On the 21st of December, 1867, one Latorre was arrested by the sheriff on a warrant issued under the non-imprisonment act of 1831. On December 31st, proceedings in bankruptcy were instituted against Latorre; on January 11th, 1868, he was declared a bankrupt, and on February 4th of that year all his estate was transferred to an assignee in bankruptcy. In an action against the sheriff to recover damages for an escape of the prisoner, which occurred in June, 1868, *held*, that the pending proceedings under the non-imprisonment act were, so far as the assignment or the discharge of Latorre from imprisonment was concerned, legally superseded by the adjudication in bankruptcy and the proceedings subsequent

thereto; that even though he had not availed himself of the discharge to which he was entitled, but remained in custody at the time of the escape, that plaintiff was not entitled to recover damages therefor. (*Maas* agt. *O'Brien*, 14 *Hun*, 95.)

2. *Void warrant, quære*, whether, in an action for an escape, the sheriff could insist that the warrant upon which the prisoner was committed was void, because issued before any action had been commenced against him. (*Id.*)
3. A debtor who is discharged in composition proceedings, instituted under the United States bankrupt act, is not thereby relieved from a previous debt fraudulently contracted. (*Libbey* agt. *Strasburger*, 14 *Hun*, 120.)
4. Section 1268 of the Code of Civil Procedure, authorizing the court, at any time after two years have elapsed since a bankrupt was discharged from his debts, to direct that any judgment entered against him be discharged of record, applies to judgments entered against him in favor of the people. (*Matter of Brandreth*, 14 *Hun*, 585.)
5. A discharge in bankruptcy of a judgment debtor pending an appeal from the judgment, does not release the sureties to an undertaking, in the form required to stay execution, given upon the appeal. (*Knapp* agt. *Anderson*, 71 *N. Y.*, 460.)
6. *It seems*, that such an undertaking is not included in the provision of the bankrupt act (*sec. 33, U. S. R. S., sec. 5118*), declaring that no discharge granted under the act shall release one liable with the bankrupt for the same debt, as surety or otherwise; this only applies to sureties liable for the debts of the bankrupt existing before, and which would be discharged by the bankrupt proceed-

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- ings, while the sureties to the undertaking do not become liable for the debt of their principal, and it does not become a debt until the happening of the contingency — *i. e.*, the affirmance of the judgment or dismissal of the appeal. (*Id.*)
7. Where a bankrupt, subsequent to his discharge in bankruptcy, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge. (*Dewey agt. Moyer*, 72 N. Y., 70.)
8. Where, prior to his discharge, the bankrupt placed property belonging to him in the hands of another to be held for his benefit, and to be restored after his discharge, or where he disposed of his property, with intent to defraud his creditors, to one cognizant of the fraudulent intent, an action is maintainable, by the holder of the judgment by confession, after return of execution thereon unsatisfied, to procure satisfaction thereof out of the property so transferred. (*Id.*)
9. Such a trust is void by statute (1 R. S., 136, sec. 1), both as to existing and subsequent creditors, and such a fraudulent transfer is also void, the transferee becoming a trustee *ex maleficio* for both classes of creditors. (*Id.*)
10. In such an action the fraudulent transferee pleaded the discharge, but did not set up as a defense the assignment and consequent vesting of title to the property sought to be reached in the assignee in bankruptcy; nor was the defense relied upon on the trial:
Held, that it could not be made available upon appeal. (*Id.*)
11. *It seems* that if an assignee in bankruptcy refuse or neglect to sue for or reclaim property fraudulently transferred by the bankrupt, the creditors may commence an action to reach the property, making the assignee, the debtors, and his transferees parties defendant; and in such action the property will be administered directly for the creditors. (*Id.*)
12. *It seems*, also, that when the assignee has been discharged, or where the plaintiffs in such action represent all the debts which the bankrupt owed at the time the assignee was appointed, his absence, as a party, will be disregarded. (*Id.*)
13. So, also, when the assignee has lost the right to sue by not bringing an action within two years, as limited by the bankrupt law (sec. 2), the creditors may bring an action in their own names. (*Id.*)
14. A state court has jurisdiction of an action by an assignee in bankruptcy to recover a debt due the bankrupt. (*Kidder agt. Horrobin*, 72 N. Y., 159.)
15. The amendment of 1874 to section first of the bankrupt act, providing that the court having charge of the estate of a bankrupt, may direct that any of his legal assets or debts, not exceeding \$500, be collected in the courts of the state, did not have the effect to confer or take away jurisdiction of the state court, but simply to allow the federal courts to decline to entertain actions at common law in which the assignee is a party, where the debt demanded is less than the amount which determines the jurisdiction of these courts in other cases. (*Id.*)
16. A suit by an assignee in bankruptcy, to collect a debt due the bankrupt, is not a matter of preceeding in bankruptcy within the meaning of section 711 of the United States Revised Statutes, declaring the jurisdiction of the state courts to be exclusive in the cases specified. (*Id.*)

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17. The declarations of a bankrupt, made before the bankruptcy, are admissible as evidence against his assignee in bankruptcy to establish or support a claim against the estate of the bankrupt. (*Von Sachs* agt. *Kretz*, 72 N. Y., 548.)

18. The statute of limitations does not run after an adjudication in bankruptcy against the claim of a creditor of the bankrupt, which was not barred by the statute at that time. (*Id.*)

An assignee in bankruptcy may bring an action to disaffirm and avoid a transfer by the bankrupt in fraud of the rights of creditors. (*See Southard* agt. *Benner*, 72 N. Y., 424.)

BILL OF SALE.

1. A written bill of sale "of twenty-three casks of wine" imports a sale of the casks as well as of the wine, unless the contrary expressly appears, and parol evidence is inadmissible to show that it was agreed at the time of the sale that the vendee should return the casks. (*Caulkins* agt. *Hellman*, 14 Hun, 330.)

BONA FIDE HOLDER.

1. Where the plaintiff receives a note from the payee in payment of a precedent debt, but surrenders no security or evidence of indebtedness and parts with no value, he is not a *bona fide* holder for value, and the note in his hands is subject to all defenses, legal and equitable, which existed against it in the hands of the original payee. (*Turner* agt. *Treadway*, ante, 28.)

2. The spirit and purpose of all the decisions lead to the establishment of the general principle that a *bona fide* holder of negotiable paper fraudulently obtained or diverted, is one who receives it before maturity without notice

and parts with value for it. (*Phoenix Insurance Company* agt. *Church*, ante, 29.)

3. Receiving a diverted note upon surrendering a past due check of the party from whom it is received is not a parting with value within the rule, because the check is merely evidence of a debt which still remained collectible. The reason stated. (*Id.*)

4. Where a plaintiff receives from the payee or holder thereof a diverted note in payment of a precedent debt and in consideration thereof alters his position by surrendering some security or evidence of indebtedness, he becomes a *bona fide* holder for value of the note received so as to shut out defenses thereto which otherwise might have been made. The reasons stated. So held, upon a reargument of the appeal herein and the present decision, in effect, reverses that previously rendered in the same case, reported, ante, page 29. (*Phoenix Insurance Company* agt. *Church*, ante, 493.)

5. One Kelly sold a horse to defendant for one hundred dollars, warranting it to be sound; fifty dollars were paid in cash and fifty dollars in a note, which was drawn by the plaintiff, who knew of the sale and warranty, which note was immediately afterwards transferred to him by Kelly, in payment of a pre-existing debt, defendant saying that it was all right. In an action upon the note, defendant set up a breach of warranty:

Held, 1, that as plaintiff was not a *bona fide* holder for value, the defendant was entitled to set up this defense, although he had not returned the horse. 2. That defendant was not estopped by his statement, as plaintiff had parted with nothing of value in reliance upon it, and as he had knowledge of all the facts. (*Buhrman* agt. *Baylis*, 14 Hun, 608.)

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BURDEN OF PROOF.

1. As a general rule, when the right of an attorney to use the name of a plaintiff is questioned by the *opposite party*, if the attorney be a reputable member of the bar, the court will not, unless the action be one for the recovery of land, require proof of the authority to be produced; but the right of the court to require its production in all cases is undoubted, and it will be exercised when, in its judgment, the ends of justice demand it. (*Stewart agt. Stewart, ante, 256.*)
2. Where an attorney has instituted a suit in which the name of a party appears as one of the plaintiffs, and his right so to do is challenged by the party whose name is used, he (the attorney) must affirmatively establish such right. The burden of proof rests upon the attorney. (*Id.*)

Burden of, showing that *bona fide* purchaser for value, before dishonor of check, had notice of defect, is upon party seeking to impeach it. (*See Cowing agt. Altman, 71 N. Y., 485.*)

Where in action to restrain interference with an easement defendant claims that plaintiff, by erections on his own lands, has destroyed the easement in whole or in part, or that the proposed interference is harmless, the burden is upon him to establish it. (*See Latimer agt. Livermore, 72 N. Y., 174.*)

When leave of court to bring action is required, it is for the plaintiff to prove authority to sue in order to maintain action. (*See Scofield agt. Doscher, 72 N. Y., 491.*)

CAUSE OF ACTION.

1. An action on the case may be maintained to recover damages for wrongfully, maliciously and

without reasonable or probable cause, filing a notice of *lis pendens*, whereby the plaintiff was prevented from selling her property. (*Smith agt. Smith, ante, 816.*)

2. The general rule in equity pleading is, that a bill may be filed against several persons relative to matters of the same nature forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were, more or less, concerned, though not guilty, in each act. (*Garner agt. Thorn, ante, 452.*)

3. The Code has not essentially altered the rules of equity pleading as it regards multifariousness. (*Id.*)

4. The language of section 484 of the Code of Civil Procedure seems to be intended to apply to equitable actions which frequently embrace complicated acts and transactions relating to the subject-matter of the action which it would be desirable to settle in a single controversy, and should not interfere with settled doctrines of equitable procedure, pleadings, parties and remedies. (*Id.*)

5. In the case of the maladministration of an estate, where an action is brought for the purpose of securing and protecting a trust, the complaint, after stating the facts necessary to show the origin and history of the trust, sets forth the legal rights of the plaintiffs and the liabilities of the different defendants in respect to the trust fund and acts and malfeasance of the defendant T., as trustee, and that he is chiefly concerned to promote the interest of G. & Co., instead of that of the trust, and it concludes with a prayer for relief in various forms adapted to the liability set forth in the complaint:

Held, that the preservation and restoration of the trust fund in its entirety is the subject-matter, "the

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cause of action," in a suit brought for that purpose, no matter how many acts of mismanagement are alleged, nor how many parties, strangers to each other, are involved in the possession, or claim the different parts of the estate.

Held, also, that although it appears that all of the defendants were not jointly concerned in every act of wrong, there are a series of acts on the part of the persons concerned in its management, and produced by the same fraudulent intent, which contributed to the injury of the plaintiffs. The several matters charged are not so distinct and unconnected as to render the joining of them in one complaint a ground of demurrer. (*Id.*)

6. The issues presented in the complaint are not such as are required to be separately tried by a court of equity; and although the reliefs growing out of the bill and prayed for in respect to the several defendants are according to their respective liabilities, it is still but one subject-matter of action. (*Id.*)
7. A prayer for judgment is not demurrable. (*Id.*)
8. A party is not liable for the consequences of an act done upon his own land, lawful in itself and which does not infringe upon any lawful rights of another, simply because he was influenced in the doing of it by wrong and malicious motive; the courts will not inquire into the motives actuating a person in the enforcement of a legal right. (*Phelps agt. Nowlen*, 72 N. Y., 89.)
9. Upon defendant's land was a spring, which was surrounded by an embankment, the effect of which was to raise the water in a well upon plaintiff's land. Defendant, not for his own benefit, but simply with intent to divert the water from plaintiff's well, dug a ditch through the embank-

ment, thus restoring the water to its natural course; the effect of which was to lower the water in the well to plaintiff's injury. In an action for damages and to restrain the diversion of the water; *held*, that the action was not maintainable. (*Id.*)

10. Defendant, while engaged as contractor in erecting a building for plaintiff, obstructed the adjoining street with building material and rubbish, and negligently left the obstructions at night without guards or lights; in consequence one McN. in passing through the street was injured. The ordinances of the city in force when defendant's contract was made, prohibited the placing of any building materials upon the streets without permission of the proper officers; they also required all such obstructions to be inclosed with suitable barriers, and to have lights at each end during the night. Defendant had been notified by the city, before the accident, to remove the obstructions. McN. brought an action against the city to recover for the injury. Of this action defendant had notice, and, also, that he would be held liable. McN. recovered a judgment. In an action to recover over the amount of such judgment, *held*, that defendant was liable; that such liability was not affected by the fact that the building was being erected for plaintiff and on its land. (*City of Rochester agt. Montgomery*, 72 N. Y., 66.)
11. Where, prior to his discharge, the bankrupt placed property belonging to him in the hands of another to be held for his benefit, and to be restored after his discharge, or where he disposed of his property, with intent to defraud his creditors, to one cognizant of the fraudulent intent, an action is maintainable by the holder of the judgment by confession, after return of execution thereon unsatisfied, to procure satisfaction thereof out of the

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property so transferred. (*Dewey* agt. *Moyer*, 12 N. Y., 70.)

12. Where money has been paid upon an erroneous judgment or decree of a surrogate, which, after the payment has been reversed, the party paying may, after demand and refusal, maintain an action to recover it back. It is not necessary to the right of action that payment should have been coerced by execution. (*Scholey* agt. *Halsey*, 72 N. Y., 578.)

Action cannot be maintained against seller of usurious note transferred without indorsement or representation as to legality, and without knowledge by him of usury, on ground of failure of consideration. (*See Littauer* agt. *Goldman*, 72 N. Y., 506.)

CERTIORARI.

1. Upon a common-law *certiorari*, the court will examine the evidence, to see if there is any competent proof to justify the adjudication made. (*People ex rel. Bancroft* agt. *Wygant*, 14 Hun, 546.)

Supreme court may, in its discretion, allow a writ of *certiorari*, even in cases where there is a remedy by appeal. (*See People ex rel. Lowenbein* agt. *Donohue*, 15 Hun, 418.)

2. On a common-law *certiorari* to review the judicial action of a board of commissioners or an inferior officer, the court is not confined to the mere question of jurisdiction, but will look into the proceedings, and if the adjudication made is unsupported by any evidence, it will be reversed. (*People ex rel. Clapp* agt. *Board of Police*, 72 N. Y., 415.)

CHALLENGE OF JURORS.

1. Where one called as a juror upon a criminal trial, on challenge for

principal cause, testifies that he has formed and expressed an opinion, but that he believes he can render an impartial verdict according to the evidence unbiased and uninfluenced by the previously formed opinion, he is competent as a juror under the act in relation to challenges of jurors (*Chap. 475, Laws of 1872; chap. 427, Laws of 1873*). (*Phelps* agt. *People*, 72 N. Y., 385.)

CHARTER-PARTY

1. Where a vessel, by the terms of the charter, was to proceed first to S. M., then to S. and lastly to C., the omission to go to S. before proceeding to C. was a deviation from the contract for which the defendants would be liable to respond to the plaintiffs in case damage resulted therefrom. (*De Castro* agt. *Brett*, ante, 484.)
2. Such deviation could, however, be excused by defendants showing that it was the result of a stress of weather, or of causes over which they had no control, and was not the result of carelessness, or neglect or want of skill on the part of the captain of the vessel. (*Id.*)
3. The burden of proof, in making out such excuse, is upon the defendants. (*Id.*)

CHATTEL MORTGAGE

1. September 25th, 1875, one Gilbert executed a chattel mortgage to the plaintiff upon all the goods then in and which he should thereafter bring into his store; it being understood and agreed that Gilbert should remain in possession, and sell the goods as though no mortgage had been given. The mortgage was duly filed in the proper town clerk's office. Gilbert remained in possession and sold goods until January 24th, 1876,

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when plaintiff—the whole mortgage being then due—took possession of the goods, locked up the store and commenced to take an inventory, preparatory to selling under his mortgage. On the 27th and 28th of January, judgments were recovered against Gilbert, for indebtedness arising prior to January 24th, and the goods were levied upon under executions issued thereon.

Held, that the mortgage was void as to all who were creditors of Gilbert prior to January 24th, 1878, whether they had then recovered judgments and issued executions or not; and that, as to them, it was not rendered valid and binding by the act of the plaintiff in taking possession of the goods prior to the recovery of the judgments and the levies thereunder. (*Dutcher* agt. *Swartwood*, 15 *Hun*, 31.)

2. A surety for a lessee has an interest in personal property mortgaged to the landlord to secure the rent, and may call upon the latter to account, and hold him responsible therefor where he has taken possession and disposed of it. (*Coe* agt. *Cassidy*, 72 *N. Y.*, 133.)
3. The landlord has a right, as against the surety, to a reasonable time in which to sell the property; and so long as there is no unreasonable or unjustifiable delay the surety cannot complain. (*Id.*)
4. While the mortgagee keeps the property he is bound to take reasonable care of it; and any reasonable expense to which he is subjected in the exercise of such care is a proper charge against it. (*Id.*)
5. Where, in such case, the landlord sold the mortgaged property at private sale to the surety, *held*, that the latter could not complain that it was sold for less than its value. (*Id.*)

6. Where, at the time of the execution of a chattel mortgage upon a stock of merchandise, it is understood and agreed between the parties that the mortgagor may go on and sell the stock and use the proceeds, generally, in his business, and the agreement is carried out by permitted sales, the transaction is fraudulent in law as against the creditors of the mortgagor. (*Southard* agt. *Benner*, 72 *N. Y.*, 424.)

7. Such an agreement, outside of the mortgage and proved by parol, is equally fatal to the instrument, as if it had been made a part thereof; and it may be inferred from the fact that the mortgagee has permitted sales to be made as alleged. (*Id.*)

CLAIM AND DELIVERY.

1. In an action to recover possession of personal property, alleged in the complaint to belong to plaintiff, and to be in the possession of, and wrongfully detained by, defendant, the answer contained a general denial; and, also, alleged that the property was owned by plaintiff, and by her pledged as security for a debt to defendant's wife, and that it was in the possession of the latter as such pledgee:

Held, that under the pleadings, defendant was not entitled to give evidence of the pledge to his wife; that, in the absence of any allegation connecting defendant with the title, possession or interest of his wife, the special matter set up in the answer constituted no defense, as plaintiff's right to the property under the alleged pledge remained perfect against all the world save the pledgee; and that defendant had no standing under his answer to try the question of right between pledgor and pledgee. (*Storrell* agt. *Otis*, 71 *N. Y.*, 36.)

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2. Where, in an action to recover possession of personal property, plaintiff claimed a special interest as mortgagee, defendants being the general owners, with a right to redeem:

Held, that the proper judgment in favor of the plaintiff was for a return of the property, or for its value, fixing it at the amount of plaintiff's interest, *i. e.*, the amount due on the mortgage, not for the full value of the property, with damages for the detention. (*Allen* agt. *Judson*, 71 N. Y., 77.)

CLAIM OF TITLE.

1. The complaint alleged that the defendant entered upon the plaintiff's close, tore away and destroyed his watering trough, diverted a stream of water, running therefrom, from its natural channel, and turned it upon plaintiff's meadow. The answer alleged that there was a highway running through plaintiff's close; that defendant entered as overseer of highways, by direction of the commissioner, and repaired the highway and watering trough, and denied that he diverted the stream from its natural channel. The referee found that the watering trough was on the side of a highway, and that defendant was overseer, but also found that defendant wrongfully diverted the stream from its natural channel, and gave judgment for plaintiff for one dollar:

Held, that the plaintiff did not recover upon a cause of action in which a claim of title to real property came in question, within section 304 of the Code, and that defendant was entitled to costs. (*Learn* agt. *Currier*, 15 Hun, 184.)

CODE OF PROCEDURE.

1. Section 11 — To authorize an appeal to this court in a case

where the judgment is less than \$500, there must be an order of general term, as prescribed by the act of 1874 (*chap. 322 Laws of 1874*), stating that the case involves some question of law which ought to be reviewed here. An order simply giving leave to appeal, without assigning any cause for so doing, is insufficient. (*Bas- table* agt. *City of Syracuse*, 72 N. Y., 64.)

2. Section 11 — The question as to the appealability of a judgment under the amendment of 1874, to this section (*chap. 322, Laws of 1874*), is determined by the amount in controversy at general term.

Although, therefore, the matters in issue on trial exceed \$500, and the judgment is for more than that sum, if the only controversy at general term is as to an item less than that sum, the judgment is not appealable. (*Brown* agt. *Sigourney*, 72 N. Y., 122.)

3. Section 30 — The provisions of subdivision 13 of this section providing for certifying actions or proceedings to the supreme court, provides only for the case of an action or proceeding pending in the county court; and as this was before the county judge he could not, under that subdivision, certify the case to the supreme court. (*Matter of Ryers et al.*, 72 N. Y., 1.)

4. Section 68, subdivision 15, makes sections 144, 147 and 148 applicable to justices' courts. (*See Frazier* agt. *Gibson*, 15 Hun, 37.)

5. Section 64, subdivision 15 — Offer in justices' court — acceptance of — what sufficient. (*See Beecher* agt. *Kendall*, 14 Hun, 327.)

6. Section 90 — An action to enforce payment of a legacy is not an action upon a sealed instrument within the meaning of this section. (*Loder* agt. *Hatfield et al.*, 71 N. Y., 92.)

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7. Sections 91-97—A case which came either within the six years' limitation prescribed by section 91 or the ten years' limitation prescribed by section 97 of the Code. (*Loder agt. Hatfield et al.*, 71 N. Y., 92.)
8. Section 103—Under the provision of this section allowing a new action to be brought within a year after the reversal upon appeal of a judgment against plaintiff, in an action brought within the time prescribed by the statute of limitations in the marine and other inferior courts, when the judgment of the marine court is reversed by the general term of the court of common pleas of New York, and by authority of that court an appeal is taken to this court, the plaintiff is not required to bring his second action within a year after the reversal by the common pleas, but may await the final determination of the appeal to this court; and, in case the reversal is affirmed, may bring suit within a year thereafter. (*Wooster agt. The Forty-second Street and Grand Street Ferry R. R. Co.*, 71 N. Y., 471.)
9. Section 105—The provisions of this section, saving the rights of parties under the statute of limitations when they are stayed by injunction, applies only to cases governed by the statute. It has no application to a limitation prescribed by contract. (*Wilkinson agt. First National Fire Insurance Co.*, 72 N. Y., 499.)
10. Sections 122, 216—In an action of claim and delivery the third subdivision of section 122 of the Code, giving the court discretion to substitute for the defendant in the action, a party who makes a claim against the defendant for the property, is necessarily to be interpreted in connection with the two hundred and sixteenth section, which provides that if the property taken in an action of claim and delivery be claimed by any other person than the defendant such person shall make an affidavit of his title to the property, and the right to the possession of it, stating the ground of such right and title and serve the same upon the sheriff; after which, by the provisions of the section, it is made incumbent upon the plaintiff to indemnify the sheriff against such claim by the undertaking therein provided for. (*Lynch agt. St. John, ante*, 144.)
11. Sections 144, 147 and 148 are, by subdivision 15 of section 63, made applicable to justices' courts. (*Id.*)
12. Section 187—Where an undertaking given under this section to procure the discharge of a defendant from arrest was, by its terms, simply a joint obligation, not joint and several, *held*, that upon the death of a surety thereto, his estate was absolutely discharged, both at law and in equity, and the surviving obligors only were liable. (*Davis agt. Van Buren*, 72 N. Y., 587.)
13. Section 211—Arrest in action of replevin—form of undertaking—when void. (*See Cook agt. Horwits*, 14 Hun, 543.)
14. Section 222—In this action, brought by the plaintiff to compel the specific performance of a verbal agreement by which the defendant agreed to reconvey a farm and the personal property thereon to the plaintiff, from whom he had purchased it, but for which he had failed to pay the purchase-price, two preliminary injunctions were granted restraining defendant from incumbering the place or collecting the rents. Upon the trial the referee decided that the agreement was void, but held that plaintiff had a vendor's lien on the land, which he directed to be foreclosed and ordered a sale, as in case of a mortgage, making no

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reference or direction as to the injunctions.

In an application against the sureties to the undertakings, given on obtaining the preliminary injunctions, for a reference to ascertain the damages sustained thereby, *held*, that the judgment did not decide that plaintiff was not entitled to the injunctions, as it was required that it should by the undertakings and by this section, and that the motion should be denied. (*Benedict* agt. *Benedict*, 15 Hun, 305.)

15. Section 223 — The undertaking to be given on the granting of a temporary injunction must conform, in terms or in substance, to the requirements of this section, and the liability of the sureties is according to those terms. (*Palmer* agt. *Foley*, 71 N. Y., 106.)

16. Section 227 — Warrant of attachment. Summons must be served within thirty days after issue of — death of defendant within such thirty days. (*See Kelly* agt. *Countryman*, 15 Hun, 97.)

17. Section 261 — Action of replevin — return of property to defendant directed — damages for taking of property — not allowed unless claimed in answer. (*See Whitcomb* agt. *Hoffman*, 14 Hun, 335.)

18. Section 267 — In an action for a divorce, a *vinculo*, defendant's answer contained recriminatory allegations of adultery by plaintiff. The issues were sent to a referee to take the testimony and report the same with his opinion thereon. The referee reported that, in his opinion, defendant was guilty of the adultery charged, but that plaintiff was not guilty. The decision of the special term stated that the court found plaintiff guilty of the adultery "as charged in the answer," and directed that the complaint be dismissed.

Held, that this was a sufficient compliance with the provision of

this section, requiring that, upon trial by the court, its decision shall contain a statement of the facts found, and the conclusions of law separately. (*Pollock* agt. *Pollock*, 71 N. Y., 187.)

19. Section 273 — When a referee's report was completed and one of the parties notified that it was ready within the sixty days' time for making report under above section — *held*, that the other party could not thereafter elect to end the reference, though the report was left in the referee's hands. (*See Waters* agt. *Shepherd*, 14 Hun, 223.)

20. Section 292 — Title to real estate of a judgment debtor passes to a receiver appointed in supplementary proceedings, by virtue of the appointment, the filing by the receiver of the security required, duly approved, and the entry and recording in the proper clerk's office of the order of appointment, without any conveyance to the receiver by the judgment debtor. (*Wing* agt. *Dase*, 15 Hun, 190.)

21. Sections 294-297 — Where an order is made, under section 297 of the Code of Procedure, directing the payment by a third person of money belonging to the judgment debtor, the latter cannot be heard to object to such order. (*Ohandler* agt. *City of Pon du Lac*, ante, 449.)

22. In an action against a foreign corporation whose property is attached under the provisions of the Code, which corporation does not appear therein, an order may be made requiring a third party indebted to or having property of such corporation and attached in such action to pay the same to the plaintiff on account of such judgment. (*Id.*)

23. Section 298 — With the appointment of a receiver in supplemen-

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- tary proceedings by a county judge, the power of the county judge over him ceases, and he is thereafter subject to the control of the court in which the judgment was obtained. (*Pool* agt. *Safford*, 14 *Hun*, 369.)
24. Section 303 — The provisions of this section abolishing statutes and rules in relation to attorneys' fees, and leaving their compensation to be fixed by agreement between them and their clients, has not abrogated the provisions of the Revised Statutes (2 *R. S.*, 288, *secs.* 71, 72) prohibiting attorneys from buying claims for prosecution, or from advancing or agreeing to advance moneys, &c., to any person as an inducement to, or a consideration for, the placing in his hands of a claim for collection. (*Coughlin* agt. *The N. Y. C. and H. R. R. Co.*, 71 *N. Y.*, 443.)
25. Section 304 — When title to real property comes in question under. (*See Learn* agt. *Currier*, 15 *Hun*, 184.)
26. Section 309 — Where the amount of an extra allowance is by inadvertence slightly in excess of the amount allowed by this section, this court will not interfere on appeal; the error should be corrected by motion to correct the judgment. (*Id.*)
27. Section 317 — An assignee in bankruptcy is not, under this section, personally liable for costs except where guilty of misconduct or bad faith (*See, to same effect, memorandum by VAN HOESEN, J., N. Y. common pleas, in Hall, assignee, agt. Waterbury, January, 1879.*) (*Wilbur* agt. *White, ante*, 321.)
28. Section 321 — This section of the Code, rendering one taking an assignment of a cause of action, after the commencement of an action thereon, liable for the costs, was not repealed by section 15 of the Code of Civil Procedure. (*Morrison* agt. *Lester*, 15 *Hun*, 538.)
29. A bailable attachment, returnable before the court, should be issued, and upon the return thereof the court should determine whether or not he wrongfully refuses to pay the costs. He cannot be compelled to do more than to apply such property as he has to their payment. (*Id.*)
30. Payment of the costs by such assignee cannot be enforced by a *capias ad satisfaciendum*. (*Id.*)
31. Section 348 — A complaint in an action upon an undertaking on appeal given in pursuance of this section, which fails to allege "service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from," ten days before the commencement of the action, is defective; the notice is a condition precedent to the commencement of the action, and in the absence of the allegation the complaint does not state a cause of action. (*Porter* agt. *Kingsbury et al.*, 71 *N. Y.*, 583.)
32. Section 366, subdivision 5 — Amendment of pleading in county court, on appeal from justices' court — what amendments can be allowed. (*See Reno* agt. *Millsbaugh*, 14 *Hun*, 229.)
33. Section 372 — A controversy submitted upon agreed facts, is to be tried at the general term, not at the special term. (*See Waring* agt. *O'Neill*, 15 *Hun*, 105.)
34. Section 375 — In a proceeding under this section, to bring in and have judgment against a joint debtor, made a party to but not served with process in the original action, it appeared that, pending the proceeding, the judgment had been assigned by the plaintiff to one Mack:
Held, that the fact of the assign-

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ment constituted no defense; that the assignee might, by motion, have been brought in as plaintiff, or that he might continue the proceeding in the name of the original plaintiff. (*Merchants' Bank agt. Waitzfelder, 14 Hun, 47.*)

35. Section 376 — Appeal to county court on questions of law — how brought to a hearing. (*See Matthews agt. Arnold, 14 Hun, 376.*)

36. Section 376 — When this section speaks of "tenants of real property owned by the judgment debtor" it means *his* tenants, and does not apply to persons holding under a deed in hostility to him and those who claim through him. (*Leonard agt. Leonard, ante, 97.*)

37. Section 388 — A statement for judgment by confession authorized judgment for the amount of two items, and alleged it was for a debt justly due the judgment creditor; as to one of the items, it alleged, in substance, that the judgment debtor "had and obtained groceries, provisions, money," &c., of one O., to the amount claimed, specifying in a general way the time:

Held, that this was a sufficient statement "of the facts out of which" the indebtedness arose to authorize a judgment under this section, that although the statement as to time was indefinite, this did not invalidate the statement. (*Harrison agt. Gibbons, 71 N. Y., 58.*)

38. Section 391 — This action was brought to recover damages for injuries to plaintiff's business, occasioned by certain libelous publications alleged to have been made by defendants as advertising agents for some persons unknown. The plaintiff procured an order for the examination of the defendants, under this section, to enable them to frame a complaint, and to ascertain the names of the persons who prepared and procured to be pub-

lished the said advertisements, in order that they might be made parties to the action:

Held, that under this section, an examination could not be ordered in a case in which the party might refuse to answer the questions to be put, on the ground that they would tend to criminate himself, and that the order should be reversed. (*Brandon Mfg. Co. agt. Bridgman, 14 Hun, 122.*)

39. Section 399 — When mother and daughter competent witnesses in their own behalf as to a conversation with the father of the mother, now deceased. (*Champlin agt. Seeber, ante, 46.*)

40. Section 399 — Although a party is not incompetent under this section to testify to an independent conversation between the deceased and a third person, yet if he participated in the conversation, and it related to a transaction between him and the deceased, he is incompetent (*Kraushaar agt. Moyer, 72 N. Y., 603.*)

41. Section 399 — Under this section one entitled to a legacy under a will could not be examined as to personal transactions with the deceased, as against his executors, although her interest was adverse to that of the party calling her. (*Gifford agt. Sackett, 15 Hun, 79.*)

42. Section 440 — Requisites of order for publication of summons. (*See McCool agt. Boller, 14 Hun, 73.*)

CODE OF CIVIL PROCEDURE.

1. Section 14 — When party may be punished for contempt under this section. (*Fischer agt. Raab et al., ante, 218.*)

2. Section 15 — Does not repeal section 821 of the Code, rendering one taking an assignment of a cause of action, after the commencement of an action thereon, liable

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for the costs. (*See Morrison agt. Lester*, 15 Hun, 538.)

3. Section 65 — Where under this section notice to appoint another attorney is served upon a party, whose attorney has died, all proceedings are stayed for thirty days, and a motion to dismiss an appeal for a failure to appoint an attorney, made within that time, is premature. Where there is more than one party, both must be notified. (*Hickox agt. Weaver*, 15 Hun, 875.)
4. Section 406. The provisions of this section saving the rights of parties under the statute of limitations when they are stayed by injunction, applies only to cases governed by the statute; it has no application to a limitation prescribed by contract. (*Wilkinson agt. First National Fire Ins. Co.*, 72 N. Y., 499.)
5. Section 549, subdivision 2 — An order of arrest may be granted in an action for injury to real property. (*See Welch agt. Winterburn*, 14 Hun, 518.)
6. Section 449 — Where the defendant and his wife entered into articles of separation whereby the defendant agreed with her and plaintiff, as her trustee, that defendant and his wife should live separate and apart, and in consideration of the premises defendant, among other things, agreed to pay, or cause to be paid, to the plaintiff, as such trustee, twenty-five dollars per week for the support and maintenance of his wife, the trustee covenanting and agreeing with the defendant to indemnify and bear him harmless from all debts of said wife contracted, or to be contracted, by her or on her account, each of the parties being bound by mutual covenants to carry out the agreement; in an action by the trustee against the husband to re-
- cover the sum of \$3,825 balance of unpaid weekly installments:
Held, that the contract with plaintiff was for the benefit of another and constituted him a trustee of an express trust within the meaning of this section. He alone would be liable to the husband for the wife's breach of covenants, and the action is properly brought in his name. (*Dupre agt. Rein*, ante, 228.)
7. Section 452 — Application to be made party defendant under, improper by lessee of corporation sought to be dissolved. (*See People agt. Albany, Vermont and Canada R. R. Co.*, 15 Hun, 126.)
8. Section 484 — The Code has not essentially altered the rules of equity pleading as it regards multifariousness. (*Garner agt. Thorn*, ante, 452.)
9. Section 484 — The language of this section *seems* to be intended to apply to equitable actions which frequently embrace complicated acts and transactions relating to the subject-matter of the action which it would be desirable to settle in a single controversy, and should not interfere with settled doctrines of equitable procedure, pleadings, parties and remedies. (*Id.*)
10. Section 543 — Where one of several defendants served with the complaint demurred thereto and the demurrer was noticed for argument, and nearly three months thereafter another defendant was served with the complaint:
Held, that the plaintiff could not amend the complaint, as of course, as to the defendant who had demurred, although the amendment was claimed within twenty days of the time the last complaint was served. (*George agt. Grant*, ante, 244.)
11. Section 544 — The authority of the court to permit or refuse a

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supplemental pleading has not been changed or affected by this section. The declaration therein that the court, "in a proper case must, upon such terms as are just," permit a party to make such a pleading, simply presents the law as it existed before.

The party must apply to the court for leave, which must be granted, unless the motion papers show a case in which the court may exercise a discretion in granting or refusing leave.

When such a case appears, the exercise of this discretion is not reviewable here. (*Spears* agt. *Mayor*, 73 N. Y., 442.)

12. Section 556 — Judge of common pleas is a county judge, within the meaning of. (*See People ex rel. Ireland* agt. *Donohue*, 15 Hun, 446.)

13. Section 558 — To justify the vacating of an order of arrest under the last clause of this section, it must affirmatively appear by the complaint that the cause of action is such that in no event could the defendant be arrested within the provisions of either section 549 or 550 (*Affirming S. C.*, 55 How., 88.) (*Bowery National Bank* agt. *Dur-yea*, ante, 42.)

14. Sections 558 — Order of arrest for fraud — what allegations in complaint necessary in action on contract. (*See Taylor* agt. *Fuas*, 14 Hun, 166.)

15. Sections 682, 683 — Plaintiff cannot, on a motion to vacate an attachment, introduce new proof to sustain or fortify the grounds upon which it was issued, where the motion is founded upon the papers upon which the warrant was granted. (*Steuben County Bank* agt. *Alberger*, ante, 345.)

16. Where the motion to vacate was made by a lienor or judgment creditor upon an affidavit setting out her judgment, &c., upon the ground of alleged insufficiency of

the original affidavits upon which the attachment was granted:

Held, that the fact of the lienor having made an affidavit showing the existence of her lien, which was attached to the motion papers and referred to in the notice of motion, did not make the motion one "founded upon proofs, by affidavit on the part of the defendant," within the meaning of section 683 of the Code of Civil Procedure, so as to entitle the plaintiff to support the attachment by new affidavits (*Reversing S. C.*, 55 How., 481). (*Id.*)

17. Section 683 — Motion to vacate an attachment — when additional papers may be used by plaintiff. (*See Ives* agt. *Holden*, 14 Hun, 402.)

18. Section 723 — Amendments to complaint — power of court to allow. (*See Bailey* agt. *Lee*, 14 Hun, 524.)

19. Section 740 — An offer to allow the plaintiff to take judgment for an amount therein specified, signed by the defendants' attorney, but to which the affidavit required by this section is not annexed, is a nullity and the plaintiff is not required either to accept or reject it. (*Riggs* agt. *Waydell*, ante, 247.)

20. There is no such thing as creating an offer by waiver. A plaintiff cannot waive it into validity as against a defendant. (*Id.*)

21. If a party desires the benefit of the statute he is bound to do just what the statute points out. (*Id.*)

22. Section 744 — An offer to allow the plaintiff to take judgment for an amount therein specified, signed by the defendant's attorney, but to which the affidavit required by this section is not annexed, is a nullity, and the plaintiff is not required either to accept or reject it. He may proceed with the action, and pay no attention thereto; nor does he

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waive any right by retaining the same without objection. (*McFurten* agt. *St. John*, 14 *Hun*, 387.)

23. Section 758 — There is nothing necessarily retrospective in this section, and the provision, that "the estate of a person or party jointly liable on contract with others shall not be discharged by his death," applies only to future contracts. (*Randall* agt. *Sackett*, *ante*, 225.)

24. Section 779 — This section, providing that, when the costs of a motion directed to be paid are not paid as therein prescribed, all proceedings on the part of the party required to pay them are stayed without further direction of the court, does not apply to a motion to vacate the order imposing the costs, on the ground of irregularity. (*Marsh* agt. *Woolsey*, 14 *Hun*, 1.)

25. Sections 829, 830 — In this action, to recover certain personal property belonging to plaintiffs' intestate, the defense was that certain notes, described in the complaint, were given by the intestate to defendant W. K. Waver, the proceeds of which were by him to be equally divided between himself and the defendant W. J. Waver; that the residue of the property described in the complaint was given to defendant W. J. Waver and his wife Mary. Upon the trial Mary was allowed to testify, as a witness for defendants, as to what occurred when the intestate was alleged to have given the notes to W. K. Waver:

Held, that, as her husband was interested in the event of the action, as he was to share in the proceeds of the notes, that his wife's testimony was incompetent, under section 830 of the Code of Civil Procedure.

W. J. Waver was also called by defendants, and asked: "Were you present when the notes were

handed over to Walter K.?" *Held*, that this called for testimony as to a personal transaction with deceased, and was inadmissible under section 829 of the Code of Civil Procedure. (*Waver* agt. *Waver*, 15 *Hun*, 277.)

26. Section 829 — This action was brought upon a bond and mortgage executed by Caroline Smith and William R. Smith, her husband, upon land belonging to the wife, to one Coolidge, and by him assigned to plaintiff's testatrix. Judgment for any deficiency that might arise was asked against W. R. Smith. Coolidge was dead. Smith was offered as a witness to prove usury in the loan to Coolidge:

Held, that his testimony was inadmissible, under this section. (*Whitehead* agt. *Smith*, 14 *Hun*, 531.)

27. Section 829 — This action was commenced in a justices' court, upon a promissory note made by Wood, and signed by Stafford for his accommodation, to the order of one Bement, who died before the commencement of the action. The plaintiff recovered a judgment against both defendants, from which Stafford alone appealed to the county court. Upon the trial in the county court, Stafford offered to prove by Wood, transactions and communications had by him (Wood) with Bement at the time of the execution of the note and subsequent thereto, to establish his defenses, one of which was an extension of the time of payment without Stafford's knowledge. The evidence was rejected as inadmissible, under this section:

Held, that its rejection was error; that the testimony of Wood was not offered "in his own behalf," as he was not a party to the appeal, nor in his "interest," as he was in no way interested in the result thereof. (*Allis* agt. *Stafford*, 14 *Hun*, 418.)

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28. Section 870—This section does not provide for the examination of parties before suit brought, on application of a party merely stating that he expected to bring an action against them, and that such an examination was necessary in order to frame a complaint in the action which he contemplated. (*Paulmier agt. Sweeney, ante, 1.*)
29. This section only provides for the examination of an expected party when *he himself* applies for it, and not for the examination of a party not yet sued, at the instance of another, who contemplates a suit against the former. (*Id.*)
30. Sections 870-873—An order for the examination of an adverse party as a witness before the trial of the action, under these sections, must be served upon the party to be examined as well as upon his attorney. Service upon the attorney alone will not authorize an attachment against the party, nor an order striking out his pleading. (*Mayer et al. agt. Noll et al., ante, 214.*)
31. Section 870—Examination of party before trial—the affidavits on application for, must conform strictly to the requirements of the Code—what they must contain. (*See Beach agt. Mayor, 14 Hun, 79.*)
32. Section 870—Officers or directors of corporations—cannot be examined under. (*See People agt. Mutual-Gas-light Co., 14 Hun, 157.*)
33. Section 870—Order for examination under—requisites of affidavit—right to examination not absolute. (*See Greer agt. Allen, 15 Hun, 432.*)
34. Section 873—An affidavit on which to base an order for the examination of a party defendant must state, as required by subdivision 2 of this section: first, the nature of the action; second, the substance of the cause of action and, third, the substance of the judgment demanded. (*Boorman agt. Pierce, ante, 251.*)
35. Where the action was brought by a stockholder against former directors of a railroad company to recover excessive prices paid for 800 shares of stock of the Pacific Railroad Company, and an order for the examination of the defendant before trial was asked for on an affidavit alleging that the action is brought "to recover as excessive prices paid in and before October, 1875, for 800 shares of Pacific railroad stock, on the faith of representations to him by some of the defendants, and in full reliance upon their personal character and statements, * * * and to recover either the unpaid value or the whole cost of said stock, together with indemnity for liabilities he may have incurred, unknowingly, in his belief of said representations; * * * and that plaintiff paid over fifty dollars per share for the stock, which is now worth only one dollar per share." *Held*, that the affidavit failed to make out a proper case for the order. It is impossible to discover from the affidavit either the nature of the action or the substance of the cause of action. In short, no one can say what the action is about. (*Id.*)
36. An affidavit is defective which alleges that the plaintiff's action is for a recovery under chapter 18, part 1, Revised Statutes. Such an allegation is worthless. It is too vague, indefinite and uncertain to be the foundation of any judicial proceeding. (*Id.*)
37. A party ordered to be examined before trial cannot be compelled to answer where there is nothing to show that any of the questions are legal and pertinent. (*Id.*)
38. Sections 872-886-887—To obtain the examination of a party before trial, each requirement of the Code must be satisfied in the

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- affidavit upon which the order is based. Service upon the attorney only is not always sufficient. (*Dunham* agt. *Mercantile Mutual Insurance Company*, ante, 240.)
39. Section 886—The provision, directing that a party to be examined as a witness before trial shall not, if a resident of this state, be required to attend in any county other than that in which he resides or where he has an office for the regular transaction of business in person, is peremptory, and will be enforced by the courts. (*Marsh* agt. *Woolsey*, 14 *Hun*, 1.)
40. Section 910—Cases in which depositions will be suppressed. (*Butler et al.* agt. *Flanders*, ante, 312.)
41. Section 967—Under this section a separate trial between the plaintiff and one or more defendants may be directed by the court in its discretion. But where there are demurrers interposed by several defendants they should be brought on for trial at the same term. (*Id.*)
42. Section 999—Discloses the grounds upon which a new trial may be granted at the circuit. (*Argall* agt. *Jacobs et al.*, ante, 167.)
43. Section 1016—The failure of a referee to be sworn in pursuance of the provisions of this section, is a mere irregularity and not a jurisdictional defect and may be waived by implication. (*Nasson* agt. *Luddington*, ante, 172.)
44. Section 1022—Under this section a motion for a new trial cannot be heard at the circuit, but should be brought on at special term. (*Argall* agt. *Jacobs et al.*, ante, 167.)
45. Section 1268—Authorizing the court, at any time after two years have elapsed since a bankrupt was discharged from his debts, to direct that any judgment entered against him be discharged of record, applies to judgments entered against him in favor of the people. (*Matter of Brandreth*, 14 *Hun*, 585.)
46. Section 1268—The right of judgment debtors discharged from their debts by proceedings in bankruptcy to have a judgment against them, canceled of record after the lapse of two years since their discharge was granted, sustained notwithstanding the fact that the judgment was a lien upon certain real estate conveyed by the bankrupts. The reasons stated. (*Fellows* agt. *Kittredge*, ante, 498.)
47. Section 1279—Right to a public office, a submission by the contestants and a municipal corporation upon agreed facts which involves the question of the right to a public office is not allowed; such question can only be determined in an action brought by the people. (*See City of Buffalo* agt. *Mackay*, 15 *Hun*, 204.)
48. Section 1279—*Quære*, as to the power of a receiver of an insolvent insurance company to submit a controversy upon an agreed statement of facts, under this section. (*Waring* agt. *O'Neill*, 15 *Hun*, 105.)
49. Section 1281—Under this section, as under section 372 of the Code of Procedure, a controversy submitted upon agreed facts, is to be tried at the general term, and it is irregular to have it heard in the first instance at special term. (*Id.*)
50. Section 1302—*Semble*, that under this section, the respondent may proceed in the same manner as it is therein provided that the appellant may. (*Hickox* agt. *Weaver*, 15 *Hun*, 375.)
51. Section 1308—The provision of this section, authorizing an appellate court to require the appellant

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to file a new undertaking, in case of the insolvency of one of the sureties, is not imperative; if the remaining surety is solvent and abundantly able to satisfy the judgment, or if the judgment is otherwise well secured, and the appeal is likely to be heard and disposed of without delay, the court, may, in its discretion, refuse the order. (*Dering* agt. *Melcalfe*, 72 N. Y., 613.)

52. Section 1340 — The court of sessions is a court of original jurisdiction, within the meaning of sections 1340 and 1357 of the Code of Civil Procedure, authorizing appeals to the supreme court from final judgments and orders affecting substantial rights of courts of record possessing original jurisdiction. (*People ex rel. Board of Charities* agt. *Davis*, 15 Hun, 209.)

53. Section 1341 — An appeal from a decree of a county judge on the final accounting of an assignee, for the benefit of creditors, is subject to the rules governing appeals from final judgments rendered by the county court under section 1340; and, to be effectual, the security required under section 1341 must be given. (*Matter of Beckwith*, 15 Hun, 326.)

54. Sections 1347-1350 — Under the Code of Civil Procedure an appeal cannot be taken from an order overruling or sustaining a demurrer. (*Lacustrine Fertilizer Co.* agt. *Lake Guano and Shell Fertilizer Co.*, ante, 370.)

55. The only remedy at the present time is by appeal from the judgment, final or interlocutory, as the case may be, entered upon the decision of law presented by the demurrer. (*Id.*)

56. In this respect the new Code differs from the former one and abrogates the right to appeal from an order of that description which was introduced by an amendment

of section 349, adopted in 1851. (*Id.*)

57. Section 1357 — Appeals from courts of sessions under — to supreme court — proper. (*See People ex rel. Board of Charities* agt. *Davis*, 15 Hun, 209.)

COMMON PLEAS.

1. A judge of the court of common pleas of the city of New York is a county judge, within the meaning of that term as used in section 556 of the Code of Civil Procedure, and an order of arrest may be granted by him. (*People ex rel. Ireland* agt. *Donohue*, 15 Hun, 446.)

CONFESSION OF JUDGMENT.

1. A statement for judgment by confession authorized judgment for the amount of two items, and alleged it was for a debt justly due the judgment creditor; as to one of the items, it alleged, in substance that the judgment-debtor "had and obtained groceries, provisions, money," etc., of one O., to the amount claimed, specifying in a general way the time:

Held, that this was a sufficient statement "of the facts out of which" the indebtedness arose to authorize a judgment under the Code (*sec. 888, sub. 2*); that although the statement as to time was indefinite, this did not invalidate the statement. (*Harrison* agt. *Gibbons*, 71 N. Y., 58.)

2. The sufficiency of the statement as to the other item, was not questioned; judgment was perfected upon the statement, and upon execution issued thereon, personal property was levied upon and sold more than sufficient to pay and satisfy that item. Subsequently real estate of the judgment debtor was sold. A motion

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on behalf of another judgment creditor, whose judgment was perfected after sale of the personal property to set aside the sale of the real estate was granted:

Held, error; that conceding that the statement was defective as to the contested item, the judgment was valid between the parties; that, in the absence of any special arrangement, the law applied the sum realized upon the sale of the personal property, generally upon the judgment; and that the debt being *bona fide*, there was no equity in favor of subsequent judgment creditors to have said sum applied to extinguish the item, as to which the statement was sufficient, in order to make the sale of the real estate void. (*Id.*)

CO-SURETIES.

1. The plaintiff and defendant's testator were joint sureties to an undertaking, given by one Eaton, on an appeal by him from a judgment recovered against him by one Burgess, in 1872. Defendant's testator died in January, 1873. In July, 1873, the judgment was affirmed, and in November of that year plaintiff was compelled to pay the amount thereof to Burgess:

Held, that plaintiff was entitled to compel the estate of his deceased co-surety to contribute one-half of the amount so paid by him. (*Cornes agt. Wilkin*, 14 Hun, 428.)

COMMISSION.

1. The bare fact of the receipt (by a witness to be examined under a commission) of both sets of interrogatories, prior to his examination, is not a sufficient ground for the entire suppression of the deposition, where no prejudice is shown to have accrued to the defendant therefrom. (*Butler et al. agt. Flanders*, ante, 312.)

2. Where it appeared, upon the face of the commission, that the witness examined under it on behalf of the plaintiffs was, prior to his examination, supplied by the counsel for the plaintiffs with copies of the interrogatories and cross-interrogatories to be administered to him; no prejudice being shown to have accrued to the defendant:

Held, that the deposition, as it was and as far as it went, might stand for what it was worth, but upon certain conditions, only. (*Id.*)

3. *Held*, further, that the fact of the receipt, by the witness, of the interrogatories in advance of his examination, would simply affect the credibility and weight of his testimony, and that this being so the defendant must have leave and an opportunity to frame and administer such further cross-interrogatories as he may be advised, and, in case he elects to avail himself of this privilege, the commission must be returned for further and final execution at the sole expense of the plaintiffs. (*Id.*)

COMMISSIONERS OF HIGHWAYS.

1. The determination of a commissioner or commissioners of highways (who, by the *Laws of 1877*, p. 171, chapter 164, sec. 1, amending chapter 440, sec. 3 *Laws of 1878*, are made inspectors of plank-roads), that the road is out of repair, or in such condition that it cannot be conveniently used by the public, and ordering the toll-gate to be thrown open, is that of a tribunal acting judicially, and should therefore be in writing. (*The People ex rel. The Penn Yan and Branchport Plank-road Company agt. Martin*, ante, 516.)
2. When they have once ordered the gate to be thrown open, and after that, upon a subsequent inspec-

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tion, on the application and claim of the plank-road company that the road has been put in repair, they make a determination that the road has been fully repaired and is in proper condition to the satisfaction of such inspector or commissioner, it is *not sufficient* to evidence such determination by an oral declaration, *but it should be reduced to writing.* (*Id.*)

COMPLAINT.

1. Under the Code of Civil Procedure an order of arrest may be obtained in two classes of cases: *First*, in those where the cause of action is identical with the cause of arrest, and *second*, in those where facts extrinsic to the cause of action constitute the cause of arrest. In the latter class of cases it is improper to allege in the complaint those extrinsic facts. (*Bowery National Bank agt. Duryea, ante, 42.*)
2. To justify the vacating of an order of arrest under the last clause of section 558 of the Code of Civil Procedure, it must *affirmatively* appear by the complaint that the cause of action is such that in no event could the defendant be arrested within the provisions of either section 549 or 550 (*Affirming S. C., 55 How., 88.*) (*Id.*)
3. Where the complaint averred that the defendant, with intent to deceive and defraud the plaintiff by inducing him to sell a certain horse to the defendant, represented to the plaintiff that he, the defendant, owned the whole of the premises occupied by him and all he owed was about \$200, by which representations plaintiff was induced to sell and deliver to defendant a horse of the value, and for which defendant promised, by a promissory note delivered at the same time, to pay the sum of \$110; that said representations were false, in that defendant did not own said premises, nor the whole of them, but occupied the most valuable portion of them on a contract on which nothing, except the interest, had been paid at the time the aforesaid representations were made; that he owed at that time exceeding \$200, and still owes it; that he knew when said representations were made that said things were so; an order of arrest was granted upon the ground of false and fraudulent representations:
Held, that the complaint was in fraud and not on contract, and that the plaintiff could not recover without proving the fraud alleged, and that the motion to vacate the order of arrest should be denied. (*Combs agt. Dunn, ante, 169.*)
4. In an action for the partition of lands where the complaint failed to state in explicit terms that the plaintiffs, who claimed title to the land as the heirs at law of a decedent in possession, were themselves in possession of their shares, or held the premises as joint tenants or as tenants in common with others:
Held, upon demurrer, that the complaint was insufficient. (*Stewart et al. agt. Munroe et al., ante, 193.*)
5. A complaint in an action for partition should conform, in its statements, to what was required to be set forth in a petition for partition under the Revised Statutes (1 R. S., p. 818, sec. 5). (*Id.*)
6. The statutes require that the "rights and titles" of the plaintiff should be set forth. (*Id.*)
7. Rights and titles under the statute considered. (*Id.*)
8. Where one seeks to avail himself of a remedial statute he should, in pleading, bring himself within its terms by clear, distinct, affirmative allegations. (*Id.*)

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See ANSWER.

Barney agt. *Northern Pacific Railroad Company*, *ante*, 23.

See TRUSTEE OF AN EXPRESS TRUST.

Dupre agt. *Rein*, *ante*, 228.

See DISMISSAL.

Ellsworth agt. *Smith*, *ante*, 237.

See PLEADING.

George agt. *Grant*, *ante*, 244.

See CAUSE OF ACTION.

Garner agt. *Thorn*, *ante*, 452.

9. Selling intoxicating liquors without a license is an illegal trade, as that term is used in chapter 583 of the Laws of 1873. In proceedings instituted under said act, it is not necessary that the complainant should be the immediate landlord of the tenant carrying on the illegal trade; the original lessor may proceed against his lessee, or any of the sub-lessees. (*People ex rel. Jay* agt. *Bennett*, 14 *Hun*, 63.)

CONDONATION.

1. If, in an action brought by a wife for a limited divorce, on the ground of cruel and inhuman treatment, the husband wishes to show that she has forfeited her right to such relief by her own ill-conduct, or that his offenses have been condoned, he must set up such defenses in his answer. (*Roe* agt. *Roe*, 14 *Hun*, 612.)

CONSTITUTIONAL LAW.

1. The provision contained in chapter 86, Laws of 1813, regulating the opening of streets, avenues and public places in the city of New York that commissioners of estimate and assessment shall not allow compensation for any building erected, in part or in whole, upon any street, avenue, public square or place laid out upon the

map or plan of the city, after the filing of the map, does not conflict with section 6 of article 1 of the Constitution, which provides that private property shall not be taken for public use without just compensation (*Matter of One Hundred and Twenty-seventh Street*, *ante*, 60.)

CONTEMPT.

1. Where a party in a proceeding agrees in open court to pay the expenses of a reference in a certain event, and the event on which his liability depends occurs and he is ordered to pay and refuses, giving no reason, he may be punished as for a contempt under section 14 subdivision 3 of the Code of Civil Procedure. (*Fischer* agt. *Raab et al.*, *ante*, 218.)
2. When a referee certifies to a certain fact which was sworn to on the reference before him, such certificate is sufficient and proper. (*Id.*)
3. Service of an order requiring a party to pay and to show cause, in default thereof, why he should not be punished for contempt, is properly made on him personally. If he cannot be found it may be served on his attorney. A demand is not necessary in addition to the service of the order requiring him to pay. (*Id.*)
4. The power of the court of common pleas to commit a party who desired a reference for a particular purpose, which was granted on his stipulation to pay referee's fees in a certain contingency, and then refusing or declining to pay them, not doubted. (*The People ex rel. Fischer* agt. *Reiley*, *ante*, 223.)
5. Where it appeared that the defendant, a railroad corporation, had been guilty of a contempt in

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failing to comply with the requirements of a writ of mandamus, but that the contempt was not willful, and that no pecuniary loss had been sustained:

Held, that it was the duty of the court to impose a fine sufficient to cover the costs and expenses in the proceedings to punish for the contempt, but that it was error to include therein the costs in the mandamus proceedings themselves. (*People ex rel. Garbutt* agt. (*R. and S. L. R. R. Co.*, 14 *Hun*, 371.)

CONTRACT.

See CORPORATIONS.

Lee agt. *Pittsburgh Coal and Mining Company*, *ante*, 373.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

Mark agt. *Hudson River Bridge Company*, *ante*, 108.

CONSIDERATION.

See STOCK.

White agt. *Drew*, *ante*, 53.

CONVERSION.

1. In an action of trespass, brought in the justice's court, to recover damages for a wrongful sale of certain personal property belonging to plaintiff, he testified that it was worth twelve dollars. Evidence offered by defendant to show that, upon the sale, the property was bid in by or for the benefit of the plaintiff for seven dollars and eighty-seven cents, was excluded:

Held, that this was error; that, as the property was bid in by the plaintiff, the damages were limited to the amount of the bid. (*Vedder* agt. *Van Buren*, 14 *Hun*, 251.)

2. Where a testator directs that certain real estate be sold, and the proceeds divided among persons named in the will, the general rule is that the legatees, if of full age, may elect to take either the land or the money, provided the rights of others are not thereby affected. (*Prentice* agt. *Janssen*, 14 *Hun*, 548.)

CONVEYANCE.

1. Action by a receiver, in behalf of a judgment creditor, to set aside, as fraudulent, a conveyance from a mother to her daughter, and to collect out of the real estate so conveyed, a judgment recovered against the mother, which real estate the mother inherited from her father. The judgment was for a debt contracted by the mother for goods purchased by her. The father died intestate January 25, 1875. The conveyance was made after the debt upon which judgment was recovered was contracted. The consideration for the conveyance was one dollar. The mother and daughter were both allowed to testify at the trial in their own behalf. The mother testified: "I had a conversation with my father January ten or twelve, and before he was taken sick, on the subject of his property, in which he said he wished me to give to my daughter Cora my share of the property. What part he gave to me *he wanted me* to give it to Cora, if it was given to me, what part was to come to me; said nothing about a will at that time, nothing else was said; I said I was willing to convey it to her, and did do it." Cora, the daughter, testified that she was present when the conversation took place between her grandfather and her mother and corroborated her mother as to the conversation. Some of the goods were bought before the death of the grandfather. The defense is that the conveyance was made in

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pursuance of the direction of the grandfather; that the mother was an equitable trustee of her father and considered herself equitably bound to execute such trust according to the request and direction of the father:

Held, that, the mother and daughter were competent witnesses in their own behalf. They were not called to speak of transactions and communications had with a deceased person against his administrator, executor, heir at law, next of kin, assignee, devisee or survivor of such deceased person (*Code, sec. 899*).

Held, also, that, as the conveyance was executed after the debt accrued upon which the judgment was recovered, and when the mother conveyed this property to her daughter, she had no other left and was insolvent, the conveyance was a mere voluntary one without a good, adequate, and valuable consideration therefor, and was void as against the plaintiff and the judgment creditor. (*Champlin agt. Seebor, ante, 46.*)

2. Nor could the conveyance be upheld as a *donatio mortis causa*. Such gifts must be consummated by a delivery and must clearly appear to have been made in contemplation of death and to be unrevoked. (*Id.*)

COPYRIGHT.

See PLAY.

Widmer agt. Green, ante, 91.

CORPORATION.

1. Directors and trustees of a corporation are its agents to advance the purposes and objects of its organization, and they have no authority, in virtue of their office, to perform acts, which to all intents and purposes, terminate the corporation by taking away from

it the power to accomplish the object of its formation. But, while this is true, yet it is the duty of the trustees of a corporation to pay its debts and to apply the corporate property to this end, although it should exhaust them, and thus disable the corporation from carrying on its business. (*Sheldon Hat Block Co. agt. Eickmeyer Hat Blocking Co., ante, 70.*)

2. The plaintiff, a corporation formed for the purpose of blocking and shaping hats, and making and licensing machines for stretching hats, for which it had letters patent, was prosecuted in the federal courts by the defendant corporation, for an infringement of its letters patent for stretching hats; the action resulted in a decree by which it was adjudged that the plaintiff's process was an infringement of the defendant's process, and it was perpetually enjoined from using the same, and it was adjudged to pay the sum of \$97,000 as damages for the infringement, which plaintiff was unable to pay. (*Id.*)

3. Whereupon the trustees of the plaintiff entered into negotiations with the trustees of the defendant corporation for a settlement of the damages, which resulted in an agreement that the plaintiff should transfer to the defendant corporation its patents for blocking, as well as those for stretching hats, which latter had been adjudged to be an infringement, in payment and discharge of the judgment for damages, and which agreement was consummated by such transfer.

Held, in an action brought five years thereafter in the name of the plaintiff corporation to set aside such transfer as fraudulent and as *ultra vires*, that the transfer was valid and should be upheld, it not appearing that the plaintiff had at the time any other means of paying the judgment; and no

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offer being made, even now, to pay the same, and no readiness or ability to do so being alleged in the complaint:

Further, that as to the patent for stretching hats, the offending patent, which could no longer be used by the plaintiff, it was just, under the circumstances, that it should be surrendered and that the process for blocking hats, which could only be profitably used in connection with the stretching process, had no such value as to approximate to the amount of the judgment for damages; and that in making the transfer the trustees of the plaintiff, who directed it, did nothing more than apply its only available means to the payment of an acknowledged indebtedness, and that the value of the property transferred was not in excess of the amount of the claim of defendant.

Also, *held*, that the transfer was not void under the provisions of the Revised Statutes (*part 1, chap. 18, tit. 4, sec. 4*) forbidding the assignment by a corporation of its property in contemplation of insolvency. (*Id.*)

4. The effect of delay in seeking equitable relief in cases of this character considered. (*Id.*)

5. It is an established rule of law that corporations may enter into and become bound by contracts, express or implied, without other formalities than are requisite in respect to like contracts made by natural persons, and under the same circumstances and conditions. But corporations, of necessity, must act solely through the instrumentality of their officers or other duly authorized agents, and such officers and agents must, like the agents of natural persons, be deemed to be clothed with all the powers and authority necessary or proper to effectuate the purposes of their creation, in the manner, with the means and ap-

pliances, and according to the usages customary in the conduct of the business and affairs intrusted to them. (*See agt. Pittsburgh Coal and Mining Company, ante, 373.*)

6. Where a corporation, in the execution of powers conferred by its charter upon its board of directors, had made M. the president and manager of the corporation, he entering into an agreement with plaintiffs by which they were to act as defendant's agents in the sale of coal, for which they were to receive a commission; in an action to recover for such commissions:

Held, that what general or special powers were by the board expressly conferred upon M., as such president and manager, can only be determined (in the absence of positive evidence) by inferences from such facts proved as throw light on this point, aided by the presumption that, as the chief executive officer and manager of the company, he must have been clothed with some powers and duties which, of necessity, pertained to those positions.

Held, also, that the same evidence upon which prudent business men ordinarily infer the existence of the authority ought to be sufficient and satisfactory to courts and juries.

Held, further, that it is not necessary to show authority by express resolution of the board of directors, or by power of attorney or other formal corporate action; but it is proper, on the question of authority, to prove various acts, statements and declarations, written and verbal, of the president and manager of the corporation, where it appears that they were done and made in the discharge of his duties, in the course of the company's business, and relating directly to current transactions therein. (*Id.*)

7. Where a person is employed for

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a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. (*Id.*)

8. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be allowed to say that the original agreement was not made by a person legally authorized to contract. (*Id.*)

See NEGLIGENCE.

Mark agt. *Hudson River Bridge Company*, ante, 108.

See PARTIES.

Carpenter agt. *Roberts*, ante, 216.

COSTS.

1. *It seems*, that it is not the usual expense of printing cases that may be taxed by the prevailing party but the actual price paid. (*This seems to be adverse to Consalus* agt. *Brotherston*, 54 *How.*, 62.) (*Potter & Markham* agt. *Carpenter & Co.*, ante, 89.)
2. Where the appellants, on appeal to the general term, printed thirty copies of case, ten copies for general term, and after affirmance at general term printed six additional pages and added to the twenty copies first printed for the court of appeals:
Held, that the appellants were not entitled to charge for printing the whole case in court of appeals but only for printing the additional pages and the expense of printing the twenty additional copies more than was required for the general term. (*Id.*)

3. An assignee in bankruptcy will not be compelled to file security for costs on the ground that there are not funds belonging to the bankrupt's estate, represented by him, sufficient to pay said costs if defendant should succeed in the action. (*Wilbur* agt. *White*, ante, 321.)

4. Nor is he, under section 317 of the old Code, personally liable for costs, except where guilty of misconduct or bad faith (*See, to same effect, memorandum* by VAN HOESEN, J., *N. Y. common pleas*, in *Hall*, assignee, agt. *Waterbury*, January, 1879). (*Id.*)

5. A party complaining of any proceeding in a cause, must embody all his objections in one motion; the court will not permit him to make separate motions for each objection he may have to make. (*McLean* agt. *Hoyt*, ante, 351.)

6. Where costs had been adjusted and inserted in the judgment without notice of adjustment, on motion by plaintiff for an order setting aside the adjustment of costs and for readjusting the same, it is not only competent but under the practice, as settled, the plaintiff has the right to require, as part of the order, a provision for the amendment of the judgment and docket. (*Id.*)

7. But where, upon a motion for readjustment, the moving party neglects to include this provision in the relief sought, a subsequent motion, for such purpose, will be denied. (*Id.*)

8. An appeal will not be dismissed where the printed papers contain the judgment roll and exceptions, although no case is made. (*Palmer* agt. *Ranken*, ante, 354.)

9. On such appeal the court will not review the granting of costs in an equity action tried before a referee, unless the evidence is pre-

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sented in a case, no matter how strong an equity the facts found make against the propriety of granting costs. (*Id.*)

10. The propriety of granting such costs depends upon the evidence which appeared before the referee, and not upon the facts found by his report. (*Id.*)

11. Although the plaintiff substantially succeeds in an equity action, it is not error to allow the costs of the action against him, and the appellate court will not review such question unless the evidence is presented by a case. (*Id.*)

12. Upon the trial of this action before a referee, the attorneys for the respective parties agreed, for convenience, to employ a stenographer to take the minutes, each party to pay one-half of the expenses of his so doing. The defendant having been successful, claimed, upon presenting his bill of costs for adjustment, to be allowed the sum of \$1,847 paid by him to the stenographer:

Held, that the item was properly rejected by the clerk; that such item was not a disbursement within the meaning of the law regulating the adjustment of costs. (*Colton* agt. *Simmons*, 14 *Hun*, 75.)

13. Section 779, providing that when the costs of a motion directed to be paid are not paid as therein prescribed, all proceedings on the part of the party required to pay them are stayed without further direction of the court, does not apply to a motion to vacate the order imposing the costs, on the ground of irregularity. (*Marsh* agt. *Woolsey*, 14 *Hun*, 1.)

14. Chapter 717 of 1870, as amended by chapter 258 of 1874, provides that a widow, in any action brought to recover dower, may file a consent to accept a gross sum in lieu thereof, and that the

court may thereupon order a sale; and that in case such sale is ordered, the plaintiff shall be entitled to recover her costs and disbursements out of the proceeds, and that "all subsequent proceedings in said action shall be conducted in accordance with the provisions" of the Revised Statutes in relation to the partition of lands, and such provisions, "for the purposes of such sale and the distribution of the proceeds thereof, are made applicable to the proceedings in such action."

Held, that the court, in an action to recover dower, in which such consent was filed, was authorized to award costs and an extra allowance to the defendant as well as to the plaintiff, and that the dower interest was to be computed only upon the proceeds remaining after the deduction of both these amounts. (*Schierloh* agt. *Schierloh*, 14 *Hun*, 572.)

15. This action was brought by the plaintiff, as executor, upon a promise made to him after the decease of his testator. A verdict having been rendered for the defendant, a judgment for costs was entered against the plaintiff, in the ordinary form, and without reference to his representative character, and an execution was issued against him *de bonis propriis*:

Held, that this was proper. (*Bostwick* agt. *Brown*, 15 *Hun*, 308.)

16. Where an action is brought against an executor individually to recover the price of a tombstone, ordered by him in pursuance of a direction in the will, and a judgment is recovered against him therein, which is paid by him, he is entitled upon his final accounting to be allowed the costs and disbursements included in the judgment in such action, and a reasonable counsel fee paid to his attorney, provided he acted in good faith in defending the action. (*Matter of Grout*, 15 *Hun*, 361.)

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17. *Quære*, as to the right of the defendant to move for an additional allowance of costs, after the entry of an order which provided "that the plaintiff have leave to discontinue the above entitled action, upon payment of the defendant's costs up to the present time, with the costs of this motion; said costs to be adjusted by the clerk of this court." (*Society of N. Y. Hospital agt. Coe*, 15 Hun, 440.)
18. Referees are not county officers within the meaning of section 6 of 1 Revised Statutes, 884, and can in no event be personally charged with the costs of a *certiorari* issued to them to review their decision. (*People ex rel. Bailey agt. Sherman*, 15 Hun, 575.)
19. In ascertaining whether the additional allowances granted by the surrogate of New York exceed the sum of \$2,000 fixed by section 309 of the Code, an amount awarded to the court stenographer is not to be considered; such amount is a disbursement in the case, and not in the nature of costs. (*Down agt. McGourkey*, 15 Hun, 444.)
20. Payment of, by an assignee of a cause of action after the commencement of an action thereon, cannot be enforced by a *capias ad satisfaciendum*—Proper course to pursue. (*See Morrison agt. Lester*, 15 Hun, 538.)
21. When the title to real property comes in question under the Code, section 304. (*See Learn agt. Currier*, 15 Hun, 184.)
22. Where, upon application to require the receiver of an insolvent life insurance company to adjust and pay losses which occurred prior to his appointment, the holders of unexpired policies come in upon their own motion, as contestants, to litigate the petitioner's claim in conjunction with the receiver, such intervening creditors are not, as of right, entitled to costs upon denial of the motion, or upon appeal, either out of the fund or against the adverse party. (*In re People agt. Secur. Life Ins. Co.* 71 N. Y., 222.)
23. *It seems*, that the receiver, in case he succeeds, is entitled to costs. (*Id.*)
24. Where the amount of an extra allowance is by inadvertence slightly in excess of the amount allowed by the Code (*sec. 309, old Code*), this court will not interfere on appeal; the error should be corrected by motion to correct the judgment. (*Kraushaar agt. Meyer*, 72 N. Y., 602.)
25. In an action to restrain the interference with an easement the value of the easement is the proper basis for an extra allowance. (*See Latimer agt. Livermore*, 72 N. Y., 174.)
26. Counsel fees in surrogate's court, when improperly allowed. (*See Shakespeare agt. Markham*, 72 N. Y., 400.)
27. When order proper under the statute (2 R. S., 652, *sec. 1*) taxing sheriff's charges for auctioneer's fees. (*See Griffin agt. Helmbold*, 72 N. Y., 437.)
28. Award of costs improper on reversal by supreme court of decision of surrogate on probate of will and remitting proceedings to surrogate. (*See Sutton agt. Ray*, 72 N. Y., 482.)

COUNTER-CLAIM.

1. A party to an action to foreclose a mortgage against whom either a personal judgment or one which may operate to transfer his estate in the land is sought, has a right to set up a counter-claim as a defense to the action. (*Seligman agt. Dudley*, 14 Hun, 186.)

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2. On May 17, 1873, plaintiff orally agreed with defendant to convey to him, July 1, 1873, sixteen lots, part of the poor-house farm, and to remove the poor-house within three years from the date of the contract, defendant agreeing to pay therefor \$5,145; ten per cent on July first, and the balance in five years, to be secured by a bond and mortgage. The defendant paid the ten per cent July first, received a conveyance and gave back a bond and mortgage to secure the remaining payments. The mortgage was foreclosed, but there was not sufficient realized on the sale to pay the amount secured thereby. In an action brought upon the bond, defendant set up, as a counter-claim, the failure of plaintiff to remove the poor-house within the three years, and claimed damages therefor:

Held, that the plaintiff, having accepted performance of the contract by defendant, could not set up its want of power to agree to remove the poor-house, in answer to plaintiff's claim for damages for its failure to do so. (*Supervisors of Schenectady agt. McQueen*, 15 Hun, 551.)

3. The parties were heirs at law and next of kin of J., deceased, of whose estate defendant was administrator. Plaintiff drew two drafts on defendant, which the latter paid. Defendant thereafter presented a verified account as administrator, to the surrogate, of moneys paid by him to the next of kin, including in the statement of moneys paid to plaintiff on account of his distributive share, the two drafts. The surrogate rejected these claims. On appeal to the general term the surrogate's decision was reversed. In an action brought by plaintiff for an accounting as to rents and profits of the real estate left by J., which had been received and collected by defendant, the latter set up as a counter-claim the sums paid upon the drafts:

Held, that the facts evinced an intention, on the part of defendant, to apply the sums paid on the drafts toward plaintiff's distributive share of the personalty, and having thus elected as to the fund out of which said sums should be paid, he was precluded from applying them as against the rents received from the realty; and that the counter-claim was properly rejected. (*Wright agt. Wright*, 72 N. Y., 149.)

4. Also, *held*, that the fact that an appeal had been taken from the decision of the general term was immaterial. (*Id.*)

COUNTY COURT.

1. In the notice of appeal to the county court, one ground specified was, that "the justice rejected proper evidence offered by the appellant."

Held, that this was sufficiently specific to authorize an examination of the question as to the rejection of the evidence above alluded to. (*Vedder agt. Van Buren*, 14 Hun, 251.)

2. The power granted to the county court to compel assignees to account, and to make distribution among creditors, is not exclusive, but is concurrent with that possessed by the supreme court. (*Converseville Co. agt. Chambersburgh Co.*, 14 Hun, 609.)

3. One Rogers, the assignee for the benefit of the creditors of one Nicholas, applied, by petition, to the supreme court for, and procured an order appointing a referee to take and state his accounts. Upon the coming in of the referee's report, the assignee was directed to sell the interest of the debtor in certain lands in Pennsylvania, and subsequently, upon a report being made showing the disposition made of the proceeds

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of the sale, the assignee was discharged:

Held, that under chapter 466 of 1877, as amended by chapter 318 of 1878, the entire original jurisdiction over these proceeds, by petition, was conferred upon the county court, and that the supreme court had no authority or jurisdiction to make the orders appealed from, and that the same were therefore void. (*Matter of Nicholas*, 15 Hun, 317.)

4. The objection that a county court has not jurisdiction over the person of defendant must be raised at the first opportunity, and is waived by his appearing in the action and pleading to the merits. (*Dake* agt. *Miller*, 15 Hun, 356.)

5. A county court has no power under the act "to extend the power of boards of supervisors" (*chap. 855, Laws of 1869, as amended by chap. 695, Laws of 1871*), to order a board of supervisors to refund a tax paid by the applicants, alleged to have been illegally assessed. (*In re Hermance*, 71 N. Y., 481.)

COUNTY JUDGE.

1. A county judge has jurisdiction in proceedings supplementary to execution based on judgments recovered in the supreme court where the judgment debtor resides or has a place of business in the county, or where a transcript has been filed when the judgment was not recovered in that county. (*Crill* agt. *Kornmeyer*, ante, 276.)

2. Has power, upon the accounting of an assignee under a general assignment, to admit or reject a claim presented by a creditor, and to determine who are and who are not entitled to participate in the distribution of the estate. (*Matter of Farnum*, 14 Hun, 159.)

3. A judge of the court of common pleas of the city of New York is a county judge, within the meaning of that term as used in section 556 of the Code of Civil Procedure, and an order of arrest may be granted by him. (*People ex rel. Ireland* agt. *Donohue*, 15 Hun, 446.)

4. Has power to accept the resignation of a receiver in supplementary proceedings, and to appoint his successor. (*See Wing* agt. *Disse*, 15 Hun, 190.)

5. Prior to the passage of the act of 1871 (*sec. 4, chap. 308, Laws of 1871*), amending the drainage act (*chap. 888, Laws of 1869*), by vesting in the county court the powers conferred by the original act upon the county judge, a county judge was not disqualified from making an order appointing commissioners under said act, although it appeared by the petition that he was interested in the matter as owner of lands to be affected. (*In Re Ryers*, 72 N. Y., 2.)

6. In such case neither the provision of the Constitution (*art. 6, sec. 15*), providing that the county judge of one county may hold county courts in other counties, nor the provision of the Code (*sec. 30, sub. 13*), providing for certifying actions or proceedings in the county court to the supreme court, applied. (*Id.*)

COURT OF SESSIONS.

1. The court of sessions is a court of original jurisdiction, within the meaning of sections 1340 and 1357 of the Code of Civil Procedure, authorizing appeals to the supreme court from final judgments and orders affecting substantial rights of courts of record possessing original jurisdiction. (*People ex rel. Board of Charities* agt. *Davis*, 15 Hun, 209.)

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COVENANTS.

See DEED.

Albany City Savings Bank agt. Martin, ante, 500.

1. The owner of a debt secured by mortgage, who holds an obligation or covenant for its payment or collection, given by a person other than the mortgagor, cannot enforce the obligation by action during the pendency of, or after judgment in an action to foreclose the mortgage, unless authorized by the court. (*Scofield agt. Doscher, 72 N. Y., 491.*)
2. Accordingly *held*, that an action was not maintainable brought without leave of the court, to recover a deficiency arising on foreclosure sale against the executor of a grantee of a portion of the mortgaged premises, who had covenanted to pay a portion of the mortgage. (*Id.*)

CREDITOR.

See ASSIGNMENT.

Whitcomb et al. agt. Fowle et al., ante, 365.

CREDITOR'S BILL.

1. This action was brought by a receiver of John McGuire to have a judgment against him declared a lien upon a lot conveyed by his father to the defendant, John McGuire's wife, plaintiff claiming that the consideration for the lot and the cost of a building erected upon it had been furnished by the son. Upon the trial John McGuire was examined, and testified that the money he had paid to the contractor had been paid by him as agent for his father. A referee, before whom he had been examined in supplementary proceedings, was then called, and was allowed, against defendant's

objection and exception, to testify that on such examination McGuire swore that this money was loaned to him by his father; and also, that he (John McGuire) gave the deed to his wife as a present:

Held, that this evidence was inadmissible as against the wife. (*Kennedy agt. McGuire, 15 Hun, 70.*)

CRIMINAL CONVERSATION.

1. In an action for *crim. con.* the divorced wife of the plaintiff is a competent witness for him, both to prove the marriage and the offense charged. (*Wottrich agt. Freeman, 71 N. Y., 601.*)
2. The judgment record in the action for divorce is competent evidence to show the status of the divorced wife and her competency as a witness. (*Id.*)
3. Such judgment cannot be attacked for error or irregularity. (*Id.*)
4. Where the former wife of the plaintiff, after testifying to the performance of a marriage ceremony between her and the plaintiff in Prussia, was asked whether that was the usual way of marriage in that country, this was objected to as incompetent, immaterial, and that no foundation was laid, the objection was overruled:
Held, no error; that the evidence was material as tending to prove a valid marriage, and that no foundation or preliminary proof was required. (*Id.*)

CRIMINAL LAW.

1. The plaintiff in error was indicted for uttering and publishing a forged check, drawn upon the Second National Bank, the indictment being defective in alleging

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that the bank, instead of the prisoner, had knowledge of the falsity and forgery of the check. Notwithstanding this defect, he was tried, and the jury, without leaving the bar, found the prisoner not guilty. A second indictment, proper in form, was then found, upon which he was tried and convicted, he objecting on the ground of his former trial and acquittal:

Held, that as it did not appear that the former acquittal resulted from a variance between the indictment and proof, or from any exception to the form and sufficiency of the indictment, the presumption was that the acquittal was on the merits, and that it was, therefore, a bar to a second trial. (*Croft* agt. *People*, 15 Hun, 484.)

DAMAGES.

1. The plaintiff was the owner of a machine called the American Needle Cotton Gin and Condenser; having invented the principle of the machine, he constructed the one in question as a model to experiment with, and to be exhibited at two fairs to be shortly thereafter held. Defendants, who had contracted to purchase the invention, wrongfully took the machine from the plaintiff for the purpose of experimenting with it themselves, and to prevent him from exhibiting it at the said fairs where they themselves intended to exhibit a rival machine of their own. Plaintiff subsequently manufactured another machine, at a cost of \$825, but it not being completed in time, plaintiff was unable to exhibit it at one of the fairs. In an action brought by him to recover the first machine and damages for its detention, it appeared that the machine had so depreciated in value as to be worth only five dollars, the cost of the materials used in its construction; and he was allowed as damages for the detention thereof, the expenses incurred in building the
- second machine, together with interest thereon:
- Held*, that the allowance of damages was as favorable to the defendant as he had a right to ask. (*Scattergood* agt. *Wood*, 14 Hun, 269.)
2. In an action of trespass, brought in the justice's court, to recover damages for a wrongful sale of certain personal property belonging to plaintiff, he testified that it was worth twelve dollars. Evidence offered by defendant to show that, upon the sale, the property was bid in by or for the benefit of the plaintiff for seven dollars and eighty-seven cents, was excluded:
- Held*, that this was error; that, as the property was bid in by the plaintiff, the damages were limited to the amount of the bid. (*Vedder* agt. *Van Buren*, 14 Hun, 251.)
3. April 24, 1878, the defendant, Dudley executed a bond and mortgage to secure the purchase-price of certain land, the deed of which to Dudley contained a clause by which the grantor (the mortgagee) covenanted to pay and discharge a prior mortgage on the same premises, for \$16,000, or to cause the said premises to be released from the lien thereof on or before July 1, 1875. The mortgage given by Dudley was assigned to the plaintiff September 1, 1875. In this action, brought by him to foreclose it, no personal claim being made against the defendant Dudley, the latter set up a breach of the covenant as a counter-claim and defense, the \$16,000 mortgage never having been paid, nor the premises released from the lien thereof:
- Held*, that, as against the mortgagee, Dudley was entitled to recover as damages for a breach of the covenant the full sum of \$16,000, although he had never paid the mortgage, or any part thereof, and had never been evicted from the premises, or sustained

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any actual loss whatever. (*Seligman* agt. *Dudley*, 14 *Hun*, 186.)

4. The plaintiff subscribed \$5,000 towards the formation of a corporation to operate an oil well, being induced so to do by the false and fraudulent representation of the defendant, that the sum of \$500,000 had been paid for the land to be conveyed to the corporation, while in fact the same had cost but \$255,000. After the formation of the corporation, 1,000 shares of stock were issued to her at five dollars per share, while if the stock had been issued to her according to the actual amount paid for the property, she would have had 1,960 shares. In an action by her to recover damages for the fraud so committed:

Held, that she was entitled to recover the value of the shares so withheld, or the money paid by her as their purchase-price; that her right to recover such damages was not affected by the fact that she had retained her own shares until they became worthless. (*Cowles* agt. *Watson*, 14 *Hun*, 41.)

5. In this action, brought by the plaintiff to compel the specific performance of a verbal agreement, by which the defendant agreed to reconvey a farm, and the personal property thereon, to the plaintiff, from whom he had purchased it, but for which he had failed to pay the purchase-price, two preliminary injunctions were granted, restraining defendant from incumbering the place or collecting the rents. Upon the trial, the referee decided that the agreement was void, but held that plaintiff had a vendor's lien on the land, as in case of a mortgage, making no reference or directions as to the injunctions.

In an application against the sureties to the undertakings, given on obtaining the preliminary injunctions, for a reference to ascertain the damages sustained thereby, *held*, that the judgment did

not decide that plaintiff was not entitled to the injunctions, as it was required that it should by the undertakings and by section 222 of the Code, and that the motion should be denied. (*Benedict* agt. *Benedict*, 15 *Hun*, 805.)

6. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. (*White* agt. *Miller*, 71 *N. Y.*, 118.)
7. The proper measure of damages for breach of warranty on the sale of seeds is the difference in value between the crop raised from the defective seed and a crop of such as would ordinarily have been produced that year. (*Id.*)
8. The referee allowed interest on the damages from the time the crop would have been harvested and sold.

Held, error. (*Id.*)

DECEIT.

1. To authorize an action under 2 Revised Statutes, 287, section 68, giving an action against an attorney, counselor or solicitor, for any deceit, with intent to deceive the court, or a party, it is not necessary that the acts of the attorney should be such as to constitute a common-law or statutory cheat. (*Loof* agt. *Lawton*, 14 *Hun*, 588.)
2. An attorney who knowingly misleads the court, or a party, is guilty of a criminal deceit, under the statute. (*Id.*)
3. An attorney who advises ignorant adult owners of land that they are not competent to convey it, and thereby induces them to employ him to institute a suit in partition, and incur the expenses

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thereof, for the purpose of effecting a sale of the lands, misleads and deceives them within the meaning of the statute. (*Id.*)

DECLARATIONS.

1. Declarations of a testator cannot be proved to establish his intention of adeeming a legacy by means of subsequent advances to the legatee, except where they are made at the time of making the advances, and with a view of giving character to the transaction. (*DeGroff agt. Terpenning*, 14 Hun, 301.)
2. *Semble*, however, that such general declarations may be given in evidence to rebut the presumption of any such intention, and that, in such a case, similar evidence may then be admissible to establish such intention. (*Id.*)

DEED.

1. In an equitable action to remove a cloud upon title to lands, the title being based upon a deed from a United States collector of internal revenue, such deed is *prima facie* evidence only of those facts which, by law, are authorized or required to be stated in it. (*Brown agt. Goodwin*, ante, 301.)
2. The recitals in a conveyance have no more force against third parties, not parties to it, than is given to them by positive law. (*Id.*)
3. Where the recitals in the deed were simply those required by section 3198 of the United States Revised Statutes, to be set forth in the certificate of purchase to be given to the purchaser by the officer making the seizure and sale, *i. e.*, the real estate purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor:

Held, that such deed is *prima facie* evidence of no other facts, save those which are needed by the laws of this state on a conveyance by a sheriff on a sale of real estate on execution. (*Id.*)

4. Before a United States collector has any authority to sell lands for taxes, the United States must acquire a lien on the property in question. There is no lien until notice and demand of the tax and neglect and refusal to pay; and no right to seize and sell real estate until there is failure to find personal estate. There can be no legal sale without these prerequisites exist previous to such sale, and the existence of them must be proved. They cannot be proven, *prima facie*, by the recitals of the deed, but may be by evidence *aliunde*. (*Id.*)
5. Parties who have accepted a deed after having had ample opportunity to examine the same before its acceptance, and also upon action being brought to enforce a covenant in such deed before it was placed on record, are not in a position which entitles them to say that it is not in conformity with their agreement of purchase. (*Albany City Savings Bank agt. Martin*, ante, 500.)
6. Where the covenant in the deed sustains the action it should not be changed or altered, or adjudged incapable of enforcement on the ground of fraud or mistake, without a trial in which the grantor may be heard. (*Id.*)
7. A deed formally accepted and put on record, and containing in clear and legibly written words the assumption clause or covenant sought to be enforced, is very high evidence of the agreement between the parties at the time of the purchase, and should not be lightly disregarded, nor set aside except upon clear and convincing proof. (*Id.*)

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8. The evidence in this case examined, commented on and held to be insufficient to maintain the defense, that the covenant in the deed to assume payment of the mortgage, was contrary to the agreement of purchase and was inserted therein by fraud or mistake without the knowledge of the grantees. (*Id.*)

9. A deed executed by a husband and wife, which "grants, bargains, sells, aliens, remises, releases, conveys and confirms" the land and "all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in and to the same," is sufficient to release the wife's inchoate right of dower in the land, and estop her from subsequently claiming the same. (*Gillilan* agt. *Swift*, 14 *Hun*, 574.)

DE FACTO OFFICER.

1. Upon the trial of an indictment for perjury in falsely swearing to an affidavit, required by law to be made, the plaintiff in error insisted that the oath was invalid, for the reason that the notary public before whom it was taken was a non-resident of the state:

Held, that even though the notary was a non-resident, yet, as he had been duly appointed and was acting as such, he was an officer *de facto*, and his acts as such were valid and binding. (*Lambert* agt. *People*, 14 *Hun*, 512.)

2. *Held*, further, that the prosecution was not bound to show affirmatively that the notary had actually taken the oath of office. (*Id.*)

DEFECT OF PARTIES.

1. How it must be taken advantage of in the justices' court. (*See Frazier* agt. *Gibson*, 15 *Hun*, 87.)

DEFENSES.

1. In a suit upon a judgment brought in a court of record of the state of New York, an equitable defense would be available by way of answer, if sufficient in substance to entitle the party to relief against the judgment. (*Montejo* agt. *Owens*, ante, 202.)

2. But in the circuit court of the United States equitable defenses are not now available in common law actions. (*Id.*)

3. Where the action is at common law and the defense is substantially an action in equity, it cannot, because it assumes the guise of an answer or defense under the state law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights. (*Id.*)

4. The jurisprudence of the United States has recognized the distinction between legal and equitable rights and suits as one of substance, as well as of form and procedure. (*Id.*)

5. The rights of the parties to a legal action must be determined as they existed at the commencement of the action. Although an equitable defense is allowed, it does not, when interposed, change the character of the action, nor authorize transactions subsequent to its commencement to be shown to affect those rights. (*Wisner* agt. *Ocuppaugh*, 71 *N. Y.*, 113.)

6. One, who has purchased from the general owner goods pledged for advances, with knowledge or notice of the lien of the pledgee, and who receives the goods from the latter with notice of his claim of a lien thereon for a specific amount, takes them with the obligation to pay the lien, and in an action therefor, cannot offset a claim against the pledgor. (*Carlington* agt. *Ward*, 71 *N. Y.*, 360.)

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7. Where goods pledged have been disposed of by the pledgee, who, however, substitutes in their place and delivers to a purchaser from the pledgor, upon the order of the latter, other goods of the same kind, quality and value, which are accepted by the purchaser, the latter cannot take advantage of the wrong of the pledgee; and it is no defense to an action by the pledgee to recover the amount of his lien upon the goods. (*Id.*)

8. The facts that the assignor of a mortgage and his assignees acted in concert with a view unnecessarily to harass and oppress the mortgagor, and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defense to an action to foreclose the mortgage. (*Morris* agt. *Tuthill*, 72 N. Y., 575.)

9. So, also, the facts that the assignee took title from motives of malice, and solely with a view to bring an action, and that the assignor assigned from a like motive, and without consideration, furnish no defense and do not impeach plaintiff's title. (*Id.*)

10. The fact that shipper of goods is doing business in fictitious name is no defense to an action by him against carrier for loss or damage. (*See Wood* agt. *Erie R. Co.*, 72 N. Y., 196.)

11. In action against railroad commissioners who have received moneys to pay interest on town bonds, the invalidity of the bonds and the fact that they defend pursuant to a resolution of town meeting, no defense. (*See F. N. Bank* agt. *Wheeler*, 72 N. Y., 201.)

DEFICIENCY.

1. *Seem*, that, where a judgment in an action to foreclose a mort-

gage provides "that if the proceeds of sale be insufficient to pay the amount so reported to be due to the plaintiff, the said referee specify the amount of such deficiency in his report of sale, and that the defendant pay the same to the plaintiff," it is unnecessary to apply to the court for an order confirming the report of the referee, before issuing execution against the defendant for the amount of the deficiency, nor is it necessary to enter any further judgment upon the filing of the said report. (*Moore* agt. *Shaw*, 15 Hun, 428.)

2. *Seem*, that it may be necessary to have the report confirmed, in order to perfect the title, as between the mortgagor and purchaser. (*Id.*)

DELIVERY.

1. Where a debtor makes a general assignment of an interest in goods not in his possession, or under his control, a delivery to the assignee is not essential to the validity of the assignment. (*Mumper* agt. *Rushmore*, 14 Hun, 591.)

2. Where the sheriff has seized the debtor's goods under an execution, the assignment will transfer the debtor's interest therein, subject to the lien of the execution, as against a subsequent attaching creditor. (*Id.*)

3. A delivery of goods by a vendor to a carrier, pursuant to the directions of the purchaser, is a good delivery to the latter. (*W. Silver Plate Co.* agt. *Green*, 72 N. Y., 17.)

DEMURRER.

See ANSWER.

Barney agt. *Northern Pacific Railroad Company*, ante, 83.

See PLEADING.

George agt. *Grant*, ante, 244.

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*See CAUSE OF ACTION.**Garner* agt. *Thorn*, ante, 452.

1. In this action, brought to recover the amount of a promissory note, the summons and complaint were served on June twenty-second. On July twelfth, defendant's attorney mailed, at Utica, a frivolous demurrer to the complaint, directed to plaintiff's attorney at Herkimer. On the morning of the thirteenth, plaintiffs called at the post-office at Herkimer, but did not find the demurrer, and entered judgment, having never received any notice of appearance from defendant. Thereafter, and on the same day, other judgments were entered against defendant, as it was alleged, in favor of his friends, and he made a general assignment, with preferences, plaintiff's debt not being preferred. Some \$800 was realized upon an execution issued under the judgments, but not sufficient to pay plaintiff's judgment, unless given priority over the other judgments of the thirteenth. On July nineteenth, the demurrer was overruled as frivolous. Upon a motion to set aside the plaintiff's judgment:

Held, that, as the circumstances tended to show that the defendant's attorney intended to prevent plaintiff from entering judgment until other judgments had obtained a preference, it was incumbent upon the said attorney to show precisely when the demurrer was mailed, and what time the first mail for Herkimer left on the next morning; that if it was mailed so late at night as to miss the first mail of the next morning the judgment was regular. That as the defendant failed to show these facts, the motion should be denied. (*Green* agt. *Howard*, 14 *Hun*, 434.)

2. When a party is entitled to have irregular proceedings set aside, considered. (*Id.*)

3. Under the Code of Civil Procedure no appeal lies from an order sustaining or overruling a demurrer—remedy under such Code. (*See Miller* agt. *Sheldon*, 15 *Hun*, 230.)

DEPOSITION.

*See COMMISSION.**Buller et al.* agt. *Flanders*, ante, 312.

DISBURSEMENTS.

*See COSTS.**Potter & Markham* agt. *Carpenter & Co.*, ante, 89.

DISCHARGE.

1. A voluntary discharge from arrest by the plaintiff of a defendant, held in custody under an execution, satisfies the judgment. (*Ravel et al.* agt. *Guillaume*, ante, 308.)
2. Such a release constitutes, in law, a satisfaction. (*Id.*)
3. Where, however, a defendant was not arrested before judgment, and on being taken into custody, after judgment, disputes the right thus to imprison him and notices a motion to be discharged to set aside the arrest, and the plaintiff, without waiting for the action of the court, consents to the defendant's discharge, such consent is not voluntary and will not operate as a satisfaction. (*Id.*)
4. In such a case it is, as to him, a determination in his favor that the execution had been irregularly issued. In such a case he cannot afterwards claim that the execution was legally issued, and because of his discharge claim the right to have the judgment against him satisfied. (*Id.*)

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5. The case is substantially the same as though the discharge had been secured without the plaintiff's assent, for it was induced by the hostile action of the defendants. (*Id.*)
6. A debtor who is discharged in composition proceedings instituted under the United States bankrupt act, is not thereby relieved from a previous debt fraudulently contracted. (*Libbey* agt. *Strasburger*, 14 *Hun*, 120.)

DISCONTINUANCE.

1. On plaintiff's application, it was ordered that he "have leave to discontinue the action" upon payment of costs, and that upon payment thereof he might enter an order discontinuing the action: *Held*, that the plaintiff might, at his election, refuse to accept the terms imposed by the order, and continue the action. (*Society of N. Y. Hospital* agt. *Coe*, 15 *Hun*, 440.)
2. Of action, by the failure of justice of the peace to appear within one hour after the time to which the case has been adjourned. (*See Flint* agt. *Gault*, 15 *Hun*, 213.)

DISMISSAL.

1. Where a cause was at issue and had been referred and several hearings had been had before the referee, when the latter declined to appoint another hearing until his fees were paid, the case remaining in this condition for over two years: *Held*, that the plaintiff had unreasonably neglected to proceed in the action, and the motion to dismiss the complaint was properly granted. (*Ellsworth* agt. *Smith*, *ante*, 237.)
2. It is not a good answer to the motion that the defendants them-

selves might have noticed the case for trial. The plaintiff had the affirmative. He was the actor until his case was presented and closed, and was himself bound to proceed. (*Id.*)

DISTRICT COURTS.

1. Under the provisions of the act of 1862 (*Laws of 1862, chap. 484*), in regard to the district courts of the city of New York, providing that no person, having a place of business in that city, shall be deemed a non-resident of it, non-residents having a place of business in the city, for purposes of suing in the district courts, are to be deemed residents of the district in which their place of business is situated. (*Clarksont* agt. *Millnacht*, *ante*, 323.)
2. Plaintiffs were partners, having a place of business in the first district, two of them being non-residents and the other a resident of the seventh district, the defendant being a resident of the ninth district. *Held*, that the suit was properly brought by long summons in the first district, under section 4 of the district court act of 1857 (*Laws 1857, chap. 144*), providing that the action may be brought in the district in which one of the plaintiffs resides. (*Id.*)

DIVORCE.

1. In a suit for divorce, a valid judgment, *in personam*, may be rendered against a defendant, not during the progress of the suit within the territorial jurisdiction of the court rendering it, provided that be the place of his citizenship and domicile, though process be served on him only in some method prescribed by the law of that jurisdiction, as a substitute for personal service, and though he has not voluntarily appeared;

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and such judgment is effectual to dissolve the marriage contract, and will be prevalent and effectual everywhere. (*Baker agt. People, 15 Hun, 256.*)

2. *Semble*, that such judgment would have the same effect, where the defendant was not a citizen of, or domiciled within, the state giving jurisdiction to the court, and especially where the marriage sought to be annulled was celebrated therein. (*Id.*)

EJECTMENT.

1. The plaintiff claims title to certain lands under a comptroller's deed, executed in 1836, which conveyed three tracts of 6,300 acres each; one to be laid out in the north-east quarter of township No. 47, Totten and Crossfield; one in the north-west quarter, and the other in the south-east quarter thereof. At the time of the giving of the deed, township No. 47 was an entirely wild and native forest. Actual possession was taken of four or five hundred acres in the south-east quarter, and valuable improvements made thereon. The party claiming under the deed, also, entered upon the north-west quarter, built a shanty and barn thereon, made roads and continued in the actual enjoyment thereof, cutting and getting logs therefrom:

Held, that the possession of the plaintiff of the tract in the north-west quarter was sufficient to enable them to maintain an action of ejectment against trespassers thereon. (*Thompson agt. Burhans, 15 Hun, 580.*)

2. Where, in an action of ejectment, it appears that the property is subject to an easement, judgment that the plaintiff have possession subject to such easement, is not ordered, unless it appears that defendant has been guilty of

some unlawful and unauthorized interference with plaintiff's rights. (*De Witt agt. Village of Ithaca, 15 Hun, 568.*)

ELECTION OF REMEDIES.

1. In order to maintain an action against the stockholders of a corporation, to recover a debt due from the latter, on the ground that the capital stock has not been paid in in full, an action must have been brought against the corporation within one year after the debt became due; and it is not a sufficient compliance with this requirement of the statute to show that, within a year, a petition in bankruptcy was filed by the plaintiff and others against the company, upon which it was adjudged a bankrupt, and in which proceedings plaintiff duly proved his claim. (*Birmingham National Bank agt. Mosser, 14 Hun, 605.*)
2. *Semble*, That the fact of the plaintiff acting as one of the petitioners in bankruptcy, evinced an election to pursue the remedy afforded by the bankrupt act, and to forego that given by the statute. (*Id.*)

EQUITABLE CONVERSION.

See WILL.

Gano agt. McCunn, ante, 337.

EQUITY.

1. The rights of parties to a legal action must be determined as they existed at the commencement of the action. Although an equitable defense is allowed, it does not, when interposed, change the character of the action, or authorize transactions subsequent to the commencement to be shown to affect those rights. (*Wisner agt. Ocumpaugh, 71 N. Y., 118.*)

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2. The bringing of an action of a distinctly equitable character is a waiver, so far as the plaintiff is concerned, of the right of trial by jury, although upon the facts he may be entitled to either legal or equitable relief; and in determining the mode of trial, the court may, as to him, be governed by the nature of the action, as stated in the complaint. (*Davison* agt. *Associates J. Co.*, 71 *N. Y.*, 338.)

3. *It seems*, that the rule as to the defendant is different; that he cannot be deprived of a jury trial, in a proper case, because the plaintiff has demanded equitable, instead of legal, relief. (*Id.*)

ERROR, WRIT OF.

1. A writ of error for review in this court only reaches to, and brings before it, errors in the record. (*People* agt. *Casey*, 72 *N. Y.*, 393.)

2. After conviction and sentence of the plaintiff in error in a court of sessions, a motion for a new trial was made under the act of 1859 (*sec. 4, chap. 339, Laws of 1859*), which was denied; he obtained a writ of error and writ of *certiorari* from the supreme court, the record and all the papers and proceedings on the motion for new trial were returned to the supreme court, where the judgment of the court of sessions was affirmed. Plaintiff in error then obtained a writ of error returnable to this court:

Held, that the writ did not bring up for review the proceedings on motion for a new trial, as they formed no part of the record. (*Id.*)

3. The objection cannot be entertained here that there was no evidence which warranted the conviction, where there is no exception in the record which raises it. (*Id.*)

4. Erroneous rulings on criminal trial

which could not have prejudged the accused, not ground for reversal. (*See Phelps* agt. *People*, 72 *N. Y.*, 365.)

ESTOPPEL.

See MORTGAGE.

Hemmenway agt. *Mulock*, *ante*, 38.

EVICTION.

1. Defendant leased certain premises to the plaintiff in March, 1874, for one or five years, at the option of the plaintiff. During the year 1874 defendant committed a number of acts which the plaintiff claimed constituted an eviction, and to recover damages for which this action was brought. At the expiration of the year, plaintiff decided to continue the lease for four years more:

Held, that such election was equivalent to taking a new lease, and as plaintiff had not been expelled from or abandoned the premises, it was a conclusive defense to an action for damages sustained because of the alleged eviction during the previous year. (*Edwards* agt. *Candy*, 14 *Hun*, 596.)

2. *Seemle*, that an eviction cannot take place without an actual expulsion from or an abandonment of the demised premises. What acts constitute a constructive eviction, considered. (*Id.*)

EVIDENCE.

See DEED.

Albany City Savings Bank agt. *Martin*, *ante*, 500.

1. This action was brought against the treasurer of an association, the complaint alleging that the defendant was "the treasurer of a joint stock company or associa-

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tion, known as the Slate Hill Cheese Factory, transacting business in the town of Palatine, consisting of more than seven shareholders." The answer was a general denial:

Held, that, in the absence of an averment in the complaint that the association was a corporation created by or under any statute of this state, the plaintiff was bound to prove the existence of such association by competent evidence, and that the articles of association being in writing, its existence could not be proved by parol evidence. (*Saltsman* agt. *Shulte*, 14 Hun, 256.)

2. Where a search warrant was issued, void on its face, as being too indefinite and uncertain, and issued on an affidavit not sufficient to give the justice jurisdiction to issue it, *held*, that, as bearing upon the question of defendant's good faith in causing the search to be made, it was competent to show that he entertained ill will and malice towards the plaintiff; that he had so expressed himself, and made threats against him during a series of years. (*Johnson* agt. *Comstock*, 14 Hun, 237.)
3. Where assessors, in making an assessment for a local improvement, have, by acting upon an erroneous principle, omitted from the assessment property benefited by the improvement, and which should have been assessed therefor, *held*, under the authority of *Clark* agt. *Village of Dunkirk* (10 S. C. N. Y., 181), that an action might be maintained by one or more of the persons assessed, in behalf of themselves and others similarly situated, to restrain the collection and enforcement of the same. (*Kennedy* agt. *City of Troy*, 14 Hun, 308.)
4. The testimony of one of the assessors, as to the principle upon which they acted in making the assessment, *held*, competent to

show that it was an erroneous one. (*Id.*)

5. Declarations of a testator cannot be proved to establish his intention of adeeming a legacy, by means of subsequent advances to the legatee, except where they are made at the time of making the advances and with a view of giving character to the transaction. (*De Groffe* agt. *Terpenning*, 14 Hun, 301.)
6. *Semble*, however, that such general declarations may be given in evidence to rebut the presumption of any such intention, and that in such case, similar evidence may then be admissible to establish such intention. (*Id.*)
7. In an action upon a promissory note the defendant, in order to establish his defense of infancy, offered in evidence a passport, containing a statement of his age, alleged to have been delivered to him on his emigration from Germany. *Held*, that it was properly rejected; that although an official document, it was made up from the statements of the defendant himself, or some person in his behalf, and is not by any statute made evidence of the correctness of its contents. (*Kobbe* agt. *Price*, 14 Hun, 55.)
8. He also offered a book called a family record, shown to be in the handwriting of his father, then living in Germany, containing the births of his several sons.
Held, that as the book was not a public record, and as the father was still living, it was properly rejected. (*Id.*)
9. A party cannot call witnesses to contradict statements made by an adverse witness, in answer to questions asked on cross-examination simply for the purpose of impeaching him. (*Id.*)
10. This action was commenced in

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a justice's court upon a promissory note made by Wood, and signed by Stafford for his accommodation to the order of one Bement who died before the commencement of the action. The plaintiff recovered a judgment against both defendants, from which Stafford alone appealed to the county court. Upon the trial in the county court, Stafford offered to prove by Wood, transactions and communications had by him (Wood) with Bement at the time of the execution of the note, and subsequent thereto, to establish his defenses, one of which was an extension of the time of payment without Stafford's knowledge. The evidence was rejected as inadmissible under section 829 of the Code of Civil Procedure:

Held, that its rejection was error; that the testimony of Wood was not offered "in his own behalf," as he was not a party to the appeal, nor in his "interest," as he was in no way interested in the result thereof. (*Allis* agt. *Stafford*, 14 Hun, 418.)

11. Upon the trial of plaintiffs in error for procuring goods in January, 1876, upon false pretenses, contained in a written statement made by them in regard to their pecuniary condition, the prosecution was allowed for the purpose of showing the prisoner's knowledge of the falsity of the written statement, to show statements made by them in the month of March, following, in regard to their then responsibility:

Held, that this was error; that the evidence was too remote to be admitted for the purpose of showing that they knew that the written statement was false when it was made. (*Shulman* agt. *People*, 14 Hun, 516.)

12. Where, upon the trial of an action, brought upon an instrument claimed to be a forgery, the party asserting the forgery writes his name, in open court, at the in-

stance of the adverse party, the latter may offer the signature so acquired in evidence, for the purpose of having it compared with the signature in controversy. (*Bronner* agt. *Loomis*, 14 Hun, 341.)

13. A written bill of sale "of twenty-three casks of wine" imports a sale of the casks as well as of the wine, unless the contrary expressly appears, and parol evidence is inadmissible to show that it was agreed, at the time of the sale, that the vendee should return the casks. (*Caulkins* agt. *Hellman*, 14 Hun, 330.)

14. This action was brought upon a note made by Van Valkenburgh, defendant's testator, and payable to the order of one Borst, plaintiff's testator. The note was incomplete in form—the amount not being fully filled in. The defense was that the note was given as a memorandum or voucher for a gold draft, drawn by Borst, as president of the Exchange Bank of Lockport, upon the Metropolitan Bank of New York, to the order of the Bank of Montreal, to settle a transaction in which Borst and Van Valkenburgh were interested, it being the intention that, when the cost of the gold draft was known, such amounts should be filled in in the note, and that the note should be discounted to pay the amount of such draft. It was claimed that afterwards such gold draft was paid for in a different manner, and the incomplete note forgotten until after Van Valkenburgh's death, when it was presented by Borst.

Upon the trial the evidence was given of the financial situation of Borst and Van Valkenburgh at the time the note was made, and at its maturity, to sustain defendant's version of the transaction, and to show the improbability of its remaining overdue without a demand for its payment:

Held, that the evidence was ad-

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missible. (*Nicholls* agt. *Van Valkenburgh*, 15 *Hun*, 230.)

15. Van Valkenburgh's son having testified that he was immediately connected in business with his father, and kept his books, was allowed to testify that neither the note or its proceeds entered into such business:

Held, no error. (*Id.*)

16. This was an action of replevin to recover goods in the hands of the sheriff, seized by him under executions issued against one Cummings, plaintiffs alleging that Cummings had purchased the goods from them by means of false and fraudulent representations, and with intent not to pay for them. Upon the trial a number of judgments recovered against Cummings — under two of which the executions were issued — were against defendant's objection and exception, received in evidence;

Held, that they were admissible, as they tended to establish the falsity of the representations and the preconceived intention not to pay for the goods. (*Hersey* agt. *Benedict*, 15 *Hun*, 232.)

17. As between creditors, judgments against the debtor, unimpeached for fraud, are conclusive evidence of indebtedness upon all questions affecting the title to the judgment debtor's property. (*Id.*)

18. In such an action, evidence that the debtor has made a general assignment is admissible, to show the intent with which he made the purchase, against creditors who have recovered judgments after the purchase and before the assignment. (*Id.*)

19. Proof of similar and contemporaneous frauds are admissible in evidence, as bearing upon the question of intent. (*Id.*)

20. *Semble*, that evidence of an attempt to commit a similar fraud,

at about the same time, by similar means, is admissible, whether it was successful or unsuccessful. (*Id.*)

21. In this action, to recover certain personal property belonging to plaintiffs' intestate, the defense was that certain notes, described in the complaint, were given by the intestate to defendant W. K. Waver, the proceeds of which were by him equally divided between himself and the defendant W. J. Waver; that the residue of the property described in the complaint was given to defendant W. J. Waver and his wife Mary. Upon the trial Mary was allowed to testify, as a witness for defendants, as to what occurred when the intestate was alleged to have given the notes to W. K. Waver:

Held, that, as her husband was interested in the event of the action, as he was to share in the proceeds of the notes, that his wife's testimony was incompetent, under section 830 of the Code of Civil Procedure.

W. J. Waver was also called by defendants, and asked: "Were you present when the note was handed over to Walter K.?"

Held, that this called for testimony as to a personal transaction with deceased, and was inadmissible under section 829 of the Code of Civil Procedure. (*Waver* agt. *Waver*, 15 *Hun*, 277.)

22. When commissioners appointed to appraise lands to be taken for railroad purposes reject legal and competent evidence, or mistake the principle that should govern their appraisal, their award will be set aside.

For many years, two tracks of the petitioner ran diagonally across Broadway, Albany, in front of a lot of one Judge, upon which stood his grocery store and dwelling-house. In 1874, the petitioner laid two additional tracks in the street, bringing them a few feet nearer Judge's building. At

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the hearing before the commissioners appointed to appraise Judge's damages arising from the occupation of the portion of the street adjacent to Judge's lot, taken for the additional tracks, and of which he owned the fee, Judge offered to prove that the passage of heavily laden cars jarred the walls and partitions of his building so seriously as to require repairs to the extent of \$1,000 a year; that the portion of the lot not taken had been depreciated in value by the noise, smoke and increased danger, and that such remaining portion would, in the future, be depreciated in value by the running of the cars over the new tracks. The commissioners rejected the evidence:

Held, that this was error. (*Matter of N. Y. C. and H. R. R. Co.*, 15 Hun, 63.)

23. The plaintiff herein assigned to one Stork two bonds and mortgages, by an instrument purporting to assign them wholly, but containing the following words: "Upon which there is to be credited, reducing the two mortgages to the sum of \$5,500 at this date."

In an action by the plaintiff against an assignee of the said mortgages, to redeem the same on payment of the amount due, *held*, that it was competent to prove, by parol, that the mortgages were not assigned absolutely, but upon a loan of \$5,000 to plaintiff upon the agreement that if this sum were not repaid in three months, the interest of the assignee therein should be \$5,500. (*Warmouth agt. Tracy*, 14 Hun, 180.)

24. *Held*, further, that the words of limitation were to be construed as a reservation to the assignor of the amount over \$5,500, and not as a statement of the amount due from the mortgagors. (*Id.*)

25. This action was brought to recover the value of services ren-

dered to the defendant in procuring a pension for her. It appeared that the plaintiff had been indicted and convicted in the United States court for charging excessive fees for getting the pension. While the indictment was pending, he had returned to the defendant \$110, which she had previously paid to him. On the trial of the indictment, his counsel, in summing up, had spoken of this as an act of generosity on his part. Upon this trial, this statement of his counsel was allowed to be proved as an admission of the plaintiff:

Held, that it was error to allow the statement to be proved. (*Adee agt. Howe*, 15 Hun, 20.)

26. This action was brought by a receiver of John McGuire, to have a judgment against him declared a lien upon a lot conveyed by his father to the defendant, John McGuire's wife, plaintiff claiming that the consideration for the lot and the cost of a building erected upon it had been furnished by the son. Upon the trial John McGuire was examined, and testified that the money he had paid to the contractor had been paid by him as agent for his father. A referee, before whom he had been examined in supplementary proceedings, was then called, and was allowed, against defendant's objection and exception, to testify that upon such examination McGuire swore that this money was loaned to him by his father; and also, that he (John McGuire) gave the deed to his wife as a present:

Held, that this evidence was inadmissible as against his wife. (*Kennedy agt. McGuire*, 15 Hun, 70.)

27. Where, after a jury has been empaneled and a witness sworn, one of the defendants is ordered to be tried separately, the jury and witness must be resworn. (*Babcock agt. People*, 15 Hun, 347.)

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28. To excuse a physician from testifying, under 2 Revised Statutes, 406, section 73, it must appear that the information was acquired while he was being consulted professionally to obtain medical assistance. (*Id.*)
29. Where a fraudulent intent is imputed to a person, or forms an element of a crime with which he is charged, he may deny the fraudulent intent, whether the effect is to defeat the action or to diminish the damage or punishment. (*Id.*)
30. Where a person, charged with crime, offers himself as a witness in his own behalf, he stands on the same footing as any other witness, and his character can only be impeached by evidence similar to that which would be required to impeach the character of any other witness. (*Crapo* agt. *People*, 15 Hun, 269.)
31. On the cross-examination of a person charged with burglary, he was asked, and against his counsel's objection and exceptions, compelled to answer the question, "were you also in 1869, along in February or March, arrested on a charge of bigamy?"
Held, that this was error. (*Id.*)
32. What evidence admissible on behalf of a person accused of theft to explain the fact of his having upon his person property, apparently a portion of that stolen. (*Id.*)
33. In this action, brought to recover the value of a dog killed by the defendant, it appeared that the dog was a farm dog, trained to bring up cows and as a watch dog, being part shepherd and part bull. Upon the trial plaintiff was asked, and, against defendant's objection and exception, allowed to state what the market value of the dog was:
Held, that, as the dog was not shown to have any market value
- the admission of the answer was error. (*Smith* agt. *Griswold*, 15 Hun, 273.)
34. Upon the trial of an action brought to recover damages for the killing of plaintiff's cow caused by the defendant not maintaining proper cattle-guards, one of plaintiff's witnesses was allowed to state, against defendant's objection and exception, that the train was running at the rate of fifteen miles an hour. The defendant's counsel asked the court to charge "that, in view of the facts of the case, the rate of speed had nothing to do with this case:"
Held, that it was error to refuse so to charge. (*White* agt. *Utica and Black River R. R. Co.*, 15 Hun, 333.)
35. In an action by an administrator, with the will annexed, to recover property of the deceased from persons claiming to own it by virtue of a gift from the testator, declarations of the deceased inconsistent with such claim, are not admissible in favor of the administrator. (*Graves* agt. *King*, 15 Hun, 367.)
36. A report made and filed by a county treasurer, in pursuance of chapter 386 of the Laws of 1859, is admissible in evidence, in an action upon his official bond, to show the amount of moneys or securities then in his hands belonging to infants or other persons. (*Supervisors of Tompkins*, agt. *Bristol*, 15 Hun, 116.)
37. Statements made by a county treasurer to his successor in office, after the expiration of his term, are not admissible against his sureties. (*Id.*)
38. Under section 899 of the Code of Procedure, one entitled to a legacy under a will could not be examined as to personal transactions with the deceased, as against

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his executors, although her interest was adverse to that of the party calling her. (*Gifford* agt. *Sackett*, 15 *Hun*, 79.)

39. In an action upon a policy of life insurance, the defendant, in order to show the insanity of the deceased's father, called the superintendent of an insane asylum in Ohio, having no personal knowledge of the disease of the father, who stated that it appeared from the records that he was twice admitted to the asylum:

Held, that this evidence was improperly admitted. (*Newton* agt. *Mutual Benefit Life Ins. Co.*, 15 *Hun*, 595.)

40. A copy from the records of the probate court, in Ohio, stating that the court visited Ross (the father), held an inquest, and, on the testimony produced, held him to be a lunatic, was also given in evidence by the defendant. No proof of the authority given to this court by the laws of Ohio was offered:

Held, that this evidence was incompetent to show the insanity of the father. (*Id.*)

41. A question in the application was: "Have they (parents, brothers or sisters) died of, or been afflicted with insanity, epilepsy, * * * or other hereditary disease?"

Held, that it was only insanity of an hereditary character that was referred to in the question and not an accidental or temporary insanity. (*Id.*)

42. Referees appointed to hear an appeal from an order, made by commissioners of highways, discontinuing a highway, cannot pass upon the question of the jurisdiction of the commissioners to make such order, but are confined to an examination of the case upon the merits. (*People ex rel. Bailey* agt. *Sherman*, 15 *Hun*, 575.)

43. The discontinuance of the highway was objected to by some because another road, which was claimed by others to have rendered the highway in question unnecessary, had upon it a steep hill. Upon the hearing, a paper, signed by the owner of the land upon which the hill was, consenting to allow the road to run through his orchard, if the road in question was closed, was received in evidence. (*Id.*)

44. *Seem*, that it was competent, as it tended to show that the objection made, on account of the hill, could be obviated. (*Id.*)

45. This action was brought to recover damages for an injury alleged to have been sustained by plaintiff by reason of defendant's negligence. An engineer was backing his engine northerly across one of the streets in Schenectady, at the rate of two miles an hour, to take in water. The plaintiff, a boy under four years of age, ran easterly on the south side of the street towards the engine, approached near to it, turned northerly, ran alongside of and beyond it, then turned across the track in front of it, was struck by it and injured.

Held, that no negligence on the part of the defendant was shown. (*Schwier* agt. *N. Y. C. and H. R. R. Co.*, 15 *Hun*, 572.)

46. In an action to recover money alleged to have been advanced to defendant by plaintiffs, one of plaintiffs' clerks testified that he made in their books the following entry: "Herman Von Keller, on account, \$10,000;" that he had no recollection of the facts contained in it, except that it was like a particular check he was told to draw; or of its correctness, except from its being in the book.

Held, that the entry was not sufficiently authenticated to render it evidence of any thing (*Peck* agt. *Von Keller*, 15 *Hun*, 470.)

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47. Upon the trial of the plaintiff in error, upon an indictment for obtaining goods by false pretenses, on or about September first, sworn schedules filed by the plaintiff in proceedings in bankruptcy commenced in the November following, were admitted in evidence on behalf of the people to show his financial condition at the time of obtaining the goods.
Held, that this was proper. (Abbott agt. *People*, 15 Hun, 437.)
48. Information, acquired by a physician in attending a patient, cannot be disclosed by him. (*Grattan* agt. *Nat. Life Ins. Co.*, 15 Hun, 74.)
49. Although presumptive evidence alone is sufficient to establish the fault of adulterous intercourse, the circumstances must lead to it, not only by fair inference but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. Evidence simply showing full and frequent opportunity for illicit, carnal intercourse, is not alone sufficient to found an inference that the criminal act was committed. (*Pollock* agt. *Pollock*, 71 N. Y., 137.)
50. General cohabitation alone—i. e., the simple living or being together all or most of the time in the same household, apart from suspicious circumstances characterizing it, is not sufficient to warrant an inference of adultery; there must be some accompanying circumstances fitted fairly to induce a belief that it was not for a proper purpose. (*Id.*)
51. Hearsay and traditional evidence is competent to prove a marriage when it is the best the nature of the case will admit of. It is not conclusive, but may establish, *prima facie*, sufficient for the administration or devolution of property, that there was either a formal marriage, which cannot otherwise be proved, or that the parties agreed *per verba de presenti* to a marriage which was followed by cohabitation. (*Chamberlain* agt. *Chamberlain*, 71 N. Y., 423.)
52. Where, by a policy of insurance upon a building issued to the owner, any loss is made payable to a mortgagee, admissions and declarations made by the owner after a loss, are not competent evidence in an action by the mortgagee upon the policy. (*Browning* agt. *Home L. Ins. Co.*, 71 N. Y., 509.)
53. In an action to recover damages for injuries to plaintiff's canal boat, evidence on the part of defendant that plaintiff was insured and has received the amount of his loss from the insurer, is incompetent; as is also, evidence showing an agreement between plaintiff and the insurer as to maintaining an action. (*Carpenter* agt. *East Tr. Co.*, 71 N. Y., 574.)
54. In an action for *crim. con.* the divorced wife of the plaintiff is a competent witness for him, both to prove the marriage and the offense charged. (*Wottrich* agt. *Freeman*, 71 N. Y., 601.)
55. The judgment record in the action for divorce is competent evidence to show the status of the divorced wife and her competency as a witness. (*Id.*)
56. Such judgment cannot be attacked for error or irregularity. (*Id.*)
57. An order for goods was given to an agent of plaintiff, the order forwarded by such agent to plaintiff, which was headed with defendant's name, was received in evidence under objection and exception:
Held, no error; that the order was no evidence of defendant's liability as purchaser, without

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- proof that defendant authorized the agent to give an order in his name, but with such proof it was competent as a communication of the order to plaintiff. (*W. Silver Plate Co. agt. Green*, 72 N. Y., 17.)
58. So, also, the entry of the order in plaintiff's order-book, headed with defendant's name, was held competent to show that plaintiff acted on the order, and charged the goods to defendant. (*Id.*)
59. In an action for slander, circumstances in mitigation must be set up in the answer in order to make evidence thereof admissible. (*Will- over agt. Hill*, 72 N. Y., 36.)
60. Where due notice of the bringing of action against it for injuries caused by an obstruction unlawfully placed in its streets is given by a municipal corporation to the wrong-doer, with a claim that he will be held liable to indemnify against any recovery therein, the judgment against it is conclusive in the action by it against him, if it is shown that he unlawfully created or negligently left the obstruction, both as to the liability of the corporation to the person injured, and as to any matter which might have been urged as a defense, and so, as to contributory negligence on the part of the person injured. (*City of Rochester agt. Montgomery*, 72 N. Y., 66.)
61. Where it appears that a debtor and others have joined in a conspiracy to defraud the creditors of the former by a fraudulent disposition of his property, the acts and declarations of the debtor, made in the absence of the others, but in execution of the common purpose, and in aid of its fulfillment are admissible against them. (*Dewey agt. Moyer*, 72 N. Y., 70.)
62. Representations made by one offering to sell property to another negotiating therefor are part of the *res gestae*, and binding upon the maker, although a bargain is not concluded at the time, if afterwards, as a continuation of the negotiation, the person to whom they were made becomes a purchaser. (*Ahern agt. Goodspeed*, 72 N. Y., 108.)
63. In an action upon a bond given to plaintiff as agreed on upon sale of an interest in a firm in which her testator was a partner, which bond was conditioned to pay the firm indebtedness; held, that evidence of plaintiff's attorney as to the presentation of claims by firm creditors against the estate, and as to his investigations to prove their correctness was competent. (*Kohler agt. Matlage*, 72 N. Y., 260.)
64. The report of a referee assessing the damages in consequence of an injunction, when duly confirmed, is, in the absence of fraud, conclusive upon the sureties to the undertaking given on the granting of the injunction, although they had no notice of the proceedings. It is, however, the safer and fairer course to give the sureties notice. (*Jordan agt. Volkenning*, 72 N. Y., 300.)
65. A gross exaggeration of value, knowingly and willfully made by a party as a witness, in the absence of the adverse party, is sufficient evidence of fraud to invalidate a judgment or assessment of damages. (*Id.*)
66. In an action, upon an undertaking given upon the granting of an injunction, to recover the damages assessed by a referee, whose report was duly confirmed, the answer alleged that plaintiffs procured the assessment by falsely and fraudulently representing that the value of the use of the premises in question was worth \$4,000 per annum, when, in truth, it did not exceed \$500. It appeared that the sureties to the undertaking were not notified of the proceedings to assess damages. Their

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principal, although notified, did not appear, and the reference proceeded *ex parte*. One of the defendants in the injunction suit was the main witness before the referee. He testified that defendants sustained damages by being kept out of possession of the land in controversy, and that the value of the possession was \$4,000 per annum. On the trial of this action, a question was asked a witness on behalf of the sureties as to what was the fair value of the rental or use of the lands. This evidence was offered on the question of fraud. It was objected to and rejected, the court stating that it would allow proof of fraud, but not, in the first instance, proof that the assessment of damages was too high:

Held, error; that the tendency of the evidence offered was not simply to prove that the damages were assessed too high, but it was to be presumed the offer was made to sustain the allegations of fraud; and, as the evidence bore upon that question, it should have been received and its effect determined afterwards (*Id.*)

67. The papers upon a motion of defendants to set aside the report, and an order denying the same, were offered in evidence by plaintiff and received under objection:

Held, error; that they were not competent to rebut evidence of fraud or to justify the rejection thereof; and, if the allegations of fraud were entirely unsustained, they were immaterial, as, in that case, the report was conclusive. (*Id.*)

68. Upon the trial the prisoner was a witness in his own behalf, and the counsel for the people upon cross-examination was permitted to question him as to other altercations in which he had been engaged, and other assaults committed by him:

Held, no error. (*People* agt. *Casey*, 72 N. Y., 394.)

69. Where, upon a criminal trial, the prisoner offers himself as a witness in his own behalf, he is subject to the same rules upon cross-examination as any other witness; he may be asked questions disclosing his past life and conduct, and thus impairing his credit, although tending to show he has before been guilty of the same crime for which he is upon trial. (*Id.*)

70. The extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court. (*Id.*)

71. In an action for slander, in imputing to plaintiff the crime of larceny, the words proved were: "When he (plaintiff) was highway commissioner he stole one thousand dollars from the town." Defendant attempted to show that he referred only to the fact that plaintiff, when he held the office of highway commissioner, upon an accounting before the town auditors, failed to produce vouchers for the sum of \$1,000 which came to his hands. (*Hayes* agt. *Ball*, 72 N. Y., 418.)

72. Upon the trial there was a contest as to what took place before the town board of auditors, defendant claiming that plaintiff did not produce vouchers, the latter claiming that he did. A witness for plaintiff was asked, and allowed to answer under objection and exception, if, at that time, any one disputed any item of plaintiff's account, or the correctness of it, or as to the amount of money received:

Held, no error; as the fact that there was no dispute tended to show that there was no question as to the vouchers. (*Id.*)

73. Also, *held*, that it was not error to receive what was shown to be a substantial copy of plaintiff's account presented to the auditors, it appearing that the original ac-

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- count had been lost by plaintiff. (*Id.*)
74. The vouchers alleged to have been presented to and allowed and passed by the auditors were received in evidence, under objection and exception, without proof of their genuineness; *held*, no error. (*Id.*)
75. The market-price of a marketable commodity may be determined as well by offers to sell, made by dealers in the ordinary course of business as by actual sales; and statements of dealers in answer to inquiries as to price are competent evidence. (*Harrison* agt. *Glover*, 72 N. Y., 451.)
76. Upon the trial of an action against a village corporation, on a contract for a street improvement, it was claimed on the part of defendant that the contract was not fully performed, and that the work and materials were imperfect and insufficient. On this issue plaintiff offered in evidence a certificate of the street superintendent, to the effect that the work was properly done, and the materials furnished such as were called for; this was received under objection and exception:
Held, error, as it did not appear that the superintendent was authorized either by the charter or the ordinances of the village, or in any other manner, to give such a certificate. (*Parr* agt. *Frest.*, &c., *Greenbush*, 72 N. Y., 464.)
77. The making, filing and recording of affidavits of the foreclosure proceedings in foreclosure of a mortgage by advertisement are not in the exercise of the power of sale; the power is fully executed when a sale has been regularly and duly made as prescribed by statute; the affidavits are merely evidence of the exercise of such power; they are but *prima facie* evidence of the facts stated (2 R. S., 547, sec. 12), and may be controverted. (*Mowry* agt. *Sanborn*, 72 N. Y., 584.)
78. The power to sell, therefore, does not rest upon proof by affidavit of publication of the notice of sale, but upon the fact of publication, and this may be shown independent of the affidavit. (*Id.*)
79. An affidavit of publication stated that deponent was "the foreman of the printer of the newspaper called the People's Journal, a public newspaper printed and published in the county of Washington, where the premises described in the annexed printed notice of sale, or a part thereof, are situated;" it then stated that "the notice of sale was published for twelve weeks successively, at least once in each week," &c.:
Held, that the fair construction of the affidavit was that the notice was published in the paper named; that it was presumptive evidence of such publication, and conclusive until controverted or disproved. (*Id.*)
80. Plaintiff was run over by a car on defendant's road. In an action to recover damages for the injury, which was alleged to have been caused by the negligence of the driver of the car, the conductor was called as a witness for the defense. He was not asked, and did not testify as to the conduct of the driver, and it did not appear that he was in a condition to observe it. Upon cross-examination he was asked, but denied that he had made statements to the effect that if the driver had looked out he would have seen the child, and would not have run over it. Plaintiff thereafter called and examined a witness as to declarations of the conductor made long after the accident. After several questions had been put to the witness in respect to these declarations, which failed to elicit any thing, in answer to a question as to what the conductor said about the driv-

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er looking or not looking, said witness answered: "He told me, he thinks the driver did not look, or the child would not have been run over." Each of these questions was objected to on the ground that the conductor's declarations were incompetent to bind defendant. The objections were overruled and exceptions taken:

Held, that the evidence was erroneously received; that such declarations were not competent as binding upon or affecting the defendant; nor were they admissible for the purpose of contradicting or affecting the credibility of the conductor, as the statement of the conductor sought to be contradicted having been drawn out on cross-examination, and not being relevant to the case, could not be contradicted. (*Furst* agt. *Second Ave. R. R. Co.*, 72 N. Y., 548.)

81. It is not error for a referee to refuse to allow a witness to show the results derived from his examination of books of account, where it does not appear that it requires expert testimony to ascertain the facts offered to be shown by the witness; while he may allow a witness with the books before him to give a summary of their contents, this is discretionary with him. (*Von Sachs* agt. *Kretz*, 72 N. Y., 548.)

82. The declarations of a bankrupt, made before the bankruptcy, are admissible as evidence against his assignee in bankruptcy to establish or support a claim against the estate of the bankrupt. (*Id.*)

83. A vendee of chattels or an assignee of a chose in action must be a purchaser for value in order to exclude the declarations of a prior party in interest from whom he derived title, made before such party parted with his interest. (*Id.*)

84. In an action upon a bond given pursuant to a surrogate's decree by an executor who has removed

from the state, to recover a legacy ordered to be paid by the surrogate's decree on the final accounting of the executor; *held*, that evidence tending to show the condition of the assets of the estate, at and prior to the time of the execution of the bond, was incompetent and properly excluded. (*Seefeld* agt. *Churchill*, 72 N. Y., 565.)

85. Also, *held*, that in the absence of fraud or collusion between the executor and legatee, the decree of the surrogate was conclusive upon the sureties. (*Id.*)

86. Upon the trial of an indictment the prisoner, while a witness in his own behalf, was asked upon cross-examination: "How many times have you been arrested?" This was objected to by his counsel upon the ground, among others, that it tended to degrade the witness, and he was privileged from answering. The objection was overruled:

Held, error; that the objection was valid, was properly taken by the prisoner's counsel, and that the exception to the ruling was available to the prisoner as a party. (*People* agt. *Brown*, 72 N. Y., 571.)

87. Although a party is not incompetent under section 899 of the old Code to testify to an independent conversation between the deceased and a third person, yet if he participated in the conversation and it related to a transaction between him and the deceased, he is incompetent. (*Kraushaar* agt. *Meyer*, 72 N. Y., 602.)

88. Accordingly, *held*, when in the course of a business transaction between plaintiff's testator and defendant M., the deceased made certain statements to V., who was engaged in drawing up papers between the parties in regard to such transaction, and which statements were in reference to it, that

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- M. was incompetent to testify thereto. (*Id.*)
89. In an action to recover damages for injuries resulting from the breaking of an iron hook and falling of a mast to a derrick belonging to defendant, plaintiff alleged negligence in that the hook was insufficient. Upon the trial plaintiff produced a piece of iron, which his evidence tended to show was part of the broken hook, and after the testimony of experts had been given, as to evidence of weakness in the iron, it was shown to the jury:
Held, no error. (*King* agt. *N. Y. C. and H. R. R. R. Co.*, 72 *N. Y.*, 607.)
90. One of plaintiff's attorneys was called as a witness in his behalf and gave material testimony. Upon cross-examination he testified that his compensation depended in some degree upon the result of the action. He was then asked "to what extent?" This was objected to and objection sustained.
Held, no error. (*Id.*)
91. The extent of a cross-examination upon a collateral issue, as to the credibility of the witness, is in the discretion of the court, and its holding is not the subject of review unless there is an abuse of discretion. (*Id.*)
92. Upon an issue as to identity, a witness may testify to opinion or belief. (*Id.*)
93. Municipal ordinance competent in action for negligence, where other evidence justifies inference that its violation contributed to injury. (*See Briggs* agt. *N. Y. C. and H. R. R. R. Co.*, 72 *N. Y.*, 26.)
94. Of agreement between husband (an alien) and wife, that he should purchase real estate and take deeds in her name, and that she should convey when he sold, competent in action by wife on note taken on sale and paid to husband. (*See Dunn* agt. *Hornbeck*, 72 *N. Y.*, 81.)
95. Of prior parol negotiations not competent to vary bill of lading. (*See Ger. F. Co.* agt. *M. and C. R. R. Co.*, 72 *N. Y.*, 90.)
96. In action against a common carrier by party who has advanced upon a bill of lading, wrongfully or negligently issued to the wrong person, a record of judgment against plaintiff in favor of owner of property, competent evidence. (*See F. and M. Bk.* agt. *Erie R. Co.*, 72 *N. Y.*, 182.)
97. When declarations and representations of agent are competent as part of the *res gestae*. (*See Mer. Bk.* agt. *Griswold*, 72 *N. Y.*, 472.)
98. In action by attorney for services, when defense is set up that the services were merely friendly and in mutual interchange of friendly services, evidence that plaintiff has received benefits, accommodations and services from defendant, is competent. (*See Young* agt. *Hunt* [Mem.], 72 *N. Y.*, 604.)
99. Evidence of custom incompetent to change or subvert positive contract. (*See Bk. of Commerce* agt. *Bissell* [Mem.], 72 *N. Y.*, 615.)

EXAMINATION OF PARTIES.

1. The eight hundred and seventieth section of the Code of Civil Procedure does not provide for the examination of parties before suit brought, on application of a party merely stating that he expected to bring an action against them, and that such an examination was necessary in order to frame a complaint in the action which he contemplated. (*Paulmier* agt. *Sweeney*, ante, 1.)
2. This section only provides for the examination of an expected party

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when *he himself* applies for it, and not for the examination of a party not yet sued, at the instance of another, who contemplates a suit against the former. (*Id.*)

3. An order for the examination of an adverse party as a witness before the trial of the action, under sections 870-873 of the Code of Civil Procedure, must be served upon the party to be examined as well as upon his attorney. Service upon the attorney alone will not authorize an attachment against the party, nor an order striking out his pleading. (*Mayer et al. agt. Noll et al., ante, 214.*)
4. To obtain the examination of a party before trial, each requirement of the Code must be satisfied in the affidavit upon which the order is based. (*Dunham agt. Mercantile Mutual Insurance Company, ante, 240.*)
5. Service upon the attorney only is not *always* sufficient (*See Pake agt. Proal, 54 How., 93; Mayer et al. agt. Noll et al., ante, 214.*) (*Id.*)
6. Where the papers present good grounds for believing that a railway company has been wrecked, the widest scope should be given to stockholders who are attempting to unearth the frauds committed by the faithless directors. (*Boorman agt. Pierce, ante, 251.*)
7. But it is due to the administration of justice that the courts whose aid is invoked should know that those asking for its process have been injured pecuniarily by the wrongful doings of the directors. (*Id.*)
8. An affidavit on which to base an order for the examination of a party defendant must state, as required by subdivision 2 of section 872: first, the nature of the action; second, the substance of the cause of action; and, third, the substance of the judgment demanded. (*Id.*)
9. Where the action was brought by a stockholder against former directors of a railroad company to recover excessive prices paid for 800 shares of stock of the Pacific Railroad Company, and an order for the examination of the defendant before trial was asked for on an affidavit alleging that the action is brought "to recover as excessive prices paid in and before October, 1875, for 800 shares of Pacific railroad stock, on the faith of representations to him by some of the defendants, and in full reliance upon their personal character and statements, * * * and to recover either the unpaid value or the whole cost of said stock, together with indemnity for liabilities he may have incurred, unknowingly, in his belief of said representations; * * and that plaintiff paid over fifty dollars per share for the stock, which is now worth only one dollar per share:"
Held, that the affidavit failed to make out a proper case for the order. It is impossible to discover from the affidavit either the nature of the action or the substance of the cause of action. In short, no one can say what the action is about. (*Id.*)
10. An affidavit is defective which alleges that the plaintiff's action is for a recovery under chapter 18, part 1, Revised Statutes. Such an allegation is worthless. It is too vague, indefinite and uncertain to be the foundation of any judicial proceeding. (*Id.*)
11. A party ordered to be examined before trial cannot be compelled to answer where there is nothing to show that any of the questions are legal and pertinent. (*Id.*)
12. The term "party," as used in section 870 of the Code of Civil Procedure, relating to the exam-

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ination of parties to an action before trial, does not include the agents, directors or officers of a party; and in action by or against a corporation, its agents, directors or officers cannot be examined thereunder. (*People agt. Mutual Gas Light Co.*, 14 Hun, 157.)

13. Of party as witness before trial—must be in county of his residence or in which he carries on business—Code of Civil Procedure, section 886—provisions of, peremptory, and will be enforced by the courts. (*See Marsh agt. Woolsey*, 14 Hun, 1.)

14. Of party, under section 391, Code, not allowed where the purpose is to compel the party to disclose a libel—cannot compel him to criminate himself. (*See Brandon Mfg. Co. agt. Bridgman*, 14 Hun, 122.)

15. Of witness in supplementary proceedings—when witness cannot be compelled to subscribe the referee's minutes. (*See Sherwood agt. Dolen*, 14 Hun, 191.)

16. Of party on his own behalf—commission for—not granted when plaintiff is a fugitive from justice, and cannot come into this state for that reason. (*See McMonagle agt. Conkey*, 14 Hun, 326.)

17. In order to authorize an order for the examination of the defendant, at the instance of the plaintiff, under section 870 of the Code of Civil Procedure, an affidavit must be presented showing the nature of the action, the substance of the cause of action, and of the judgment demanded, and after answer the nature of the defense, and also the facts showing that the testimony is material and necessary for the party making the examination. (*Groer agt. Allen*, 15 Hun, 432.)

18. An affidavit stating that the action "is brought upon a contract, and that the judgment demanded

is for the sum of six hundred and ninety dollars, with interest; that the answer of the defendant is a general denial," and that "the examination of the defendant is necessary," and also stating the matters as to which the examination is desired, is not sufficient. (*Id.*)

19. Where the facts and circumstances stated are not sufficient to satisfy the judge, he is not bound to grant the order but should refuse the same. (*Id.*)

20. Order for a second examination of a party before trial only granted upon special facts being shown justifying the re-examination. (*See Dambmann agt. Butterfield*, 15 Hun, 495.)

EXCEPTIONS.

1. To enable a party to review the trial of his case by a court or referee, it is only necessary to except to the conclusions of law; facts are not the subject of an exception. (*Roe agt. Roe*, 14 Hun, 612.)

2. Right to go to jury on a particular question—waived by request to have jury find on other questions which concede the particular one. (*See Merritt agt. Cole*, 14 Hun, 324.)

3. Necessary to enable appellate court to review the charge on a trial in the over and terminer—section 3, chapter 337, of 1855 as amended by chapter 330 of 1858 restricted to trials in the New York sessions. (*See Brotherton agt. People*, 14 Hun, 486.)

4. Where there is conflicting evidence upon a question of fact in an action on trial before a referee, a request on behalf of one of the parties to find the fact as claimed by him, and a refusal by the referee, is not the ground of an ex-

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ception. (*Potter agt. Carpenter*, 71 N. Y., 74.)

5. Refusal of referee to find a fact not incontrovertibly proved no ground of exception; if party desires findings, must apply to court for order requiring supplemental report. (*See Putnam agt. Fur-nam* [Mem.], 71 N. Y., 590.)
6. Where in a case tried by a jury there is no motion for a nonsuit or exception to charge the verdict is final as to facts. (*See Manning agt. Jackson* [Mem.], 71 N. Y., 599.)

EXECUTION.

1. Against the person — voluntary discharge of defendant from arrest, by the plaintiff — when not a satisfaction of the judgment on which the execution issued. (*See Rowe agt. Guillaume*, 15 Hun, 462.)
2. Neglect to return — mere irregularity in judgment no defense to sheriff sued therefor. (*See Forsyth agt. Campbell*, 15 Hun, 235.)
3. Of will — what proof, as to request to witness to subscribe it, necessary. (*See Heath agt. Cole*, 15 Hun, 100.)
4. Defendant R. was in actual custody under an order of arrest herein when judgment against him and his co-defendants was rendered; execution was issued against the property of the defendants, January 31, 1876. In September, 1876, a motion by plaintiff to compel the sheriff to return the execution was denied on the ground that he had attachments in his hands against defendants issued prior to the execution, and that the attachment suits were undetermined. On motion that plaintiff be required to issue execution against the body of R. it appeared that no property of R. had been attached; that prior to making the motion

he served on plaintiff's attorneys a demand that they issue an execution against his body, and a stipulation that charging him in execution should in no way prejudice plaintiffs' rights under the property execution. It appeared also that the attachments were still pending. The special term ordered that R. be discharged, unless plaintiff issue execution against his person:

Held, that the special term had power to grant the order, and its discretion in exercising it could not be reviewed here. (*N. Y. G. and I. Co. agt. Rogers*, 71 N. Y., 877.)

5. The implied prohibition of the Code against issuing a body execution, until the return of a property execution unsatisfied is for the benefit of the judgment debtor, and may be waived by him. (*Id.*)
6. It is not a conclusive answer to an application under section 288 of the Code, by one of several judgment debtors imprisoned under an order of arrest, for a discharge from imprisonment because of neglect to issue a body execution within three months after judgment, that there is good reason for not returning the property execution owing to circumstances affecting his co-defendants only. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

See SURVIVORSHIP.

Oregon agt. Brooklyn Cross Town Railroad Company, ante, 33.

1. This action was brought by the plaintiff, as executor, upon a promise made to him after the decease of his testator. A verdict having been rendered for the defendant, a judgment for costs was entered against the plaintiff, in the ordinary form, and without reference to his representative

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character, and an execution was issued against him *de bonis propriis*:

Held, that this was proper. (*Bostwick* agt. *Brown*, 15 *Hun*, 308.)

2. Where an action is brought against an executor individually to recover the price of a tombstone, ordered by him in pursuance of a direction in the will, and a judgment is recovered against him therein, which is paid by him, he is entitled upon his final accounting to be allowed the costs and disbursement included in the judgment in such action, and a reasonable counsel fee paid to his attorney, provided he acted in good faith in defending the action. (*Matter of Grout*, 15 *Hun*, 361)

3. In an action by an administrator, with the will annexed, to recover property of the deceased from persons claiming to own it by virtue of a gift from the testator, declarations of the deceased, inconsistent with such claim, are not admissible in favor of the administrator. (*Graves* agt. *King*, 15 *Hun*, 367.)

EXTRA ALLOWANCE.

1. This action was brought to have 3,574 bonds of a railroad company, which were in the hands of the defendant, declared invalid and void, and to have them delivered up and canceled. The defendant claimed that they were valid, but offered to surrender 2,974 upon receiving fifty dollars per bond, which he claimed to have paid for them, and interest from the time of purchase. The court decided that plaintiff was entitled to the relief demanded in the complaint and granted an extra allowance of \$2,000.

Held, that there was sufficient evidence as to the value of the subject of the action to authorize the allowance, and that the order

granting it should be affirmed. (*Sickles* agt. *Richardson*, 14 *Hun*, 110.)

FALSE PRETENSES.

1. Upon the trial of plaintiffs in error for procuring goods in January, 1876, upon false pretenses, contained in a written statement made by them in regard to their pecuniary condition, the prosecution was allowed, for the purpose of showing the prisoner's knowledge of the falsity of the written statement, to show statements made by them in the month of March following, in regard to their then responsibility:

Held, that this was error; that the evidence was too remote to be admitted for the purpose of showing that they knew that the written statement was false when it was made. (*Shulman* agt. *People*, 14 *Hun*, 517.)

FEES.

1. Upon a sale of lands in an action for partition, the referee conducting the same is entitled to receive for his services a commission not exceeding in any case the sum of \$500. (*Richards* agt. *Richards*, 14 *Hun*, 25.)
2. The provisions of the Code (*sec.* 308), abolishing statutes and rules in relation to attorneys' fees, and leaving their compensation to be fixed by agreement between them and their clients, has not abrogated the provisions of the Revised Statutes (2 *R. S.*, 288, *secs.* 71, 72) prohibiting attorneys from buying claims for prosecution, or from advancing or agreeing to advance moneys, &c., to any person as an inducement to, or a consideration for, the placing in his hands of a claim for collection. (*Coughlin* agt. *N. Y. C. and H. R. R. Co.*, 71 *N. Y.*, 443.)

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FINDINGS OF LAW AND FACT.

1. Where there is conflicting evidence upon a question of fact, in an action on trial before a referee, a request on behalf of one of the parties to find the fact as claimed by him, and a refusal by the referee, is not the ground of an exception. (*Potter* agt. *Carpenter*, 71 N. Y., 74.)
2. But where the fact is material, and the referee refuses to make any finding upon the subject, and the court, on motion, refuses to send the case back for a finding as to such question of fact, a judgment of general term affirming the judgment entered upon the report of the referee, is error. (*Id.*)
3. In an action for a divorce, a *vinculo*, defendant's answer contained recriminatory allegations of adultery by plaintiff. The issues were sent to a referee to take the testimony and report the same with his opinion thereon. The referee reported that, in his opinion, defendant was guilty of the adultery charged, but that plaintiff was not guilty. The decision of the special term stated that the court found plaintiff guilty of the adultery "as charged in the answer," and directed that the claim be dismissed:
Held, that this was a sufficient compliance with the provision of the Code (section 267), requiring that, upon trial by the court, its decision shall contain a statement of the facts found, and the conclusions of law separately. (*Pollock* agt. *Pollock*, 71 N. Y., 137.)
4. The finding of a material fact where there is a total absence of evidence to sustain it, is error of law, reviewable in this court upon due and proper exception. (*Id.*)
5. The general rule that the findings of a court or referee upon the facts are conclusive upon this

court, if there is any evidence to warrant them, applies as well to actions of equity as actions at law. (*Stillwell* agt. *Mut. L. Ins. Co.*, 72 N. Y., 385.)

FORECLOSURE.

1. The owner of a debt secured by mortgage, who holds an obligation or covenant for its payment or collection, given by a person other than the mortgagor, cannot enforce the obligation by action during the pendency of, or after judgment in an action to foreclose the mortgage, unless authorized by the court. (*Seafeld* agt. *Doscher*, 72 N. Y., 491.)
2. The provisions of the Revised Statutes in reference to judgments in and the parties to foreclosure suits (2 R. S., 191, *secs.* 152, 153, 154) are parts of one system, and are to be construed together, the object being to confine all the proceedings for the collection of the mortgage debt due to one court and one action. (*Id.*)
3. Accordingly *held*, that an action was not maintainable, brought without leave of the court, to recover a deficiency arising on foreclosure sale against the executor of a grantee of a portion of the mortgaged premises, who had covenanted to pay a portion of the mortgage. (*Id.*)
4. Affidavits of foreclosure and sale in proceedings to foreclose a mortgage by advertisement may be taken before notaries public; by the act of 1859, in relation to these officers (*chap.* 60, *Lucas* of 1859), they were added to the list of officers who, under the Revised Statutes (2 R. S., 547, *sec.* 11), could take such affidavits. (*Monory* agt. *Sanborn*, 72 N. Y., 534.)
5. One copy of the notice of sale to which all the affidavits are annexed is a sufficient compliance

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- with the statute; it is not necessary to annex a separate copy to each affidavit. (*Id.*)
6. The rule that in the construction of written instruments certainty to a common intent is sufficient, and that they are not vitiated for want of that accuracy of statement which precludes all argument, inference and presumption, applies to the statutory proofs of foreclosure and sale by advertisement. (*Id.*)
 7. The making, filing and recording of affidavits of the foreclosure proceedings in foreclosure of a mortgage by advertisement are not in the exercise of the power of sale; the power is fully executed when a sale has been regularly and duly made as prescribed by statute; the affidavits are merely evidence of the exercise of such power; they are but *prima facie* evidence of the facts stated (3 R. S., 547, sec. 12), and may be controverted. (*Id.*)
 8. The power to sell, therefore, does not rest upon proof by affidavit of publication of the notice of sale, but upon the fact of publication, and this may be shown independent of the affidavit. (*Id.*)
 9. An affidavit of publication stated that deponent was "the foreman of the printer of the newspaper called the People's Journal, a public newspaper printed and published in the county of Washington, where the premises described in the annexed printed notice of sale, or a part thereof, are situated;" it then stated that "the notice of sale was published for twelve weeks successively, at least once in each week," &c.:
Held, that the fair construction of the affidavit was that the notice was published in the paper named; that it was presumptive evidence of such publication, and conclusive until controverted or disproved. (*Id.*)
 10. The facts that the assignor of a mortgage and his assignee acted in concert with a view unnecessarily to harass and oppress the mortgagor, and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defense to an action to foreclose the mortgage. (*Morris* agt. *Tuthill*, 72 N. Y., 575.)
 11. So, also, the facts that the assignee took title from motives of malice, and solely with a view to bring an action, and that the assignor assigned from a like motive, and without consideration, furnish no defense, and do not impeach plaintiff's title. (*Id.*)
 12. It is sufficient to sustain the action that the mortgage debt is due, has been transferred to and is owned by plaintiff; and the mortgagor can only arrest the action by paying or tendering, and bringing into court the amount due. (*Id.*)

FOREIGN EXECUTORS.

1. Foreign executors are not recognized in their official capacity by domestic courts of law, and they cannot be sued therein as such. They may, however, be proceeded against in equity under certain circumstances, and upon proper allegations, to prevent waste of property brought within the jurisdiction, and secure its application to the payment of the debts of the testator according to the law of the state whence they derived their authority. (*Field* agt. *Gibson*, ante, 232.)

FOREIGN JUDGMENTS

1. The jurisdiction of a court of another state in which a judgment has been rendered is always open to inquiry in the courts of this

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state, and the judgment may be also questioned collaterally for fraud. (*Hunt agt. Hunt*, 72 N. Y., 217.)

2. To authorize a disregard of the judgment because of fraud there must be fraudulent allegations and representations, designed and intended to mislead, with knowledge of falsity, and resulting in damaging deception. (*Id.*)
3. That a party not competent as a witness under the laws of the state was permitted to testify in his own behalf is not a fraud, nor does it affect the jurisdiction, and so does not afford reason for questioning the judgment collaterally. (*Id.*)

GENERAL ASSIGNMENT.

1. Where a debtor makes a general assignment of an interest in goods not in his possession, or under his control, a delivery to the assignee is not essential to the validity of the assignment. (*Mumper agt. Rushmore*, 14 Hun, 591.)
2. Where the sheriff has seized the debtor's goods under an execution, the assignment will transfer the debtor's interest therein, subject to the lien of the execution, as against a subsequent attaching creditor. (*Id.*)
3. Where goods are consigned to a firm to sell upon a *del credere* commission, and such firm makes a general assignment for the benefit of its creditors, the consignors are respectively entitled to all the proceeds of the goods so consigned which come into the hands of the assignee. (*Converseville Co. agt. Chambersburgh Co.*, 14 Hun, 609.)
4. Where an application is made to compel an assignee for the benefit of creditors to render an account, he cannot defeat the application by alleging that the assignment has been rendered void by his own

failure to file the bond and schedule of assets as required by the statute. (*Matter of Furnum*, 14 Hun, 159.)

5. A county judge has power, upon the accounting of the assignee, to admit or reject a claim presented by a creditor, and to determine who are and who are not entitled to participate in the distribution of the estate. (*Id.*)
6. The fact that an assignee denies that any thing is due to one who applies to have him compelled to render an account, furnishes no reason why such application should be denied. (*Id.*)

GENERAL TERM.

1. The only direction or order the supreme court can make upon the reversal upon a question of fact of a surrogate's decree on application for the probate of a will, is to award an issue to be tried by a jury as directed by the statute (3 R. S., 66, sec. 65 et seq.; *id.*, 609, sec. 98). (*Sutton agt. Ray*, 72 N. Y., 432.)
2. When general term on appeal from order of special term may make such order as should have been made below. (*See Griffin agt. Helmbold*, 72 N. Y., 437.)

HABEAS CORPUS.

1. Chapter 663 of 1873, which amended the acts relating to writs of *habeas corpus*, by providing that where proceedings commenced under such acts are removed into the supreme court, or whenever an appeal may be taken by the prisoner to the court of appeals, "and the offense with which such prisoner stands charged is one for which such prisoner may be admitted to bail by the laws of this state," the court may admit him to bail, simply renders more com-

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plete and effective the review of those cases in which the writ could be lawfully prosecuted under the provisions of the Revised Statutes already in force. It was not intended to enlarge the number of cases in which bail might be taken, nor the cases which might be reviewed upon *habeas corpus*. (*People ex rel. Phelps* agt. *Oyer and Terminer*, 14 Hun, 21.)

2. The act relating to writs of *habeas corpus* does not apply to cases in which the prisoner is held by virtue of a judgment or decree of a competent tribunal having jurisdiction to pronounce the same, or by virtue of an execution issued thereon. (*Id.*)

3. One Jewett, charged with an offense, demanded an examination before the police justice, whereupon the proceedings were adjourned. On the day to which they were adjourned he waived an examination and offered bail for his appearance at the general sessions. The police justice refused to accept the bail and proceeded with the examination, whereupon he was served with a writ of *certiorari*, issued by a justice of the supreme court under the *habeas corpus* act, and, on the hearing had on the return thereto, it was ordered that the police justice at once fully commit the said Jewett for trial with or without bail, or fully discharge him:

Held, that no such order was authorized by the *habeas corpus* act. (*People ex rel. Phelps* agt. *Donohue*, 14 Hun, 133.)

4. *Semble*, that the only power to interfere in such cases would be by the mandamus of a superior court, or that form of *certiorari* which would bring up for review the alleged illegal assumption of power. (*Id.*)

HIGHWAYS.

1. The statute (1 R. S., 501, sec. 1) requiring commissioners of high-

ways to keep the bridges and highways in repair imposes upon them the duty of active oversight and constant vigilance, and requires them to exercise a reasonable degree of watchfulness in ascertaining, from time to time, the condition of the highways and bridges, and in preventing them from becoming dilapidated or dangerous. (*Bostwick* agt. *Barlow*, 14 Hun, 177.)

2. The mere fact that they have not been notified of the existence of a defect, does not necessarily relieve them from liability to one who has been injured by reason of their failure to discover and repair the same. (*Id.*)

HUSBAND AND WIFE.

1. In articles of separation between husband and wife, through the intervention of a trustee, the covenant on the part of the husband to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy. (*Dupre* agt. *Rein*, ante, 228.)
2. Where a husband purchased land, incumbered by a mortgage, and directed that the deed be made out in the name of his wife, he intended to make her a gift of the land; the deed contained a covenant, on the part of the grantee, to pay the mortgage; the wife was, however, ignorant of the transaction, and had no knowledge of the deed or its covenant; it appearing that the husband paid, with his own funds, the consideration on the purchase, and, in like manner, discharged the taxes and assessments:

Held, that the wife, on a foreclosure of the mortgage, was not liable for any deficiency arising on the sale. (*Munson* agt. *Dyett*, ante, 333.)

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3. Although a married woman may enter into engagements with respect to her separate estate, there is nothing in the marital relation which authorizes a husband, without his wife's knowledge or assent, to create an estate in lands in her and charge her personally with a covenant in respect thereto. (*Id.*)

4. Where services have been rendered by a married woman, and her husband has not released his right to her services, she cannot maintain an action to recover the value thereof. (*Carpenter* agt. *Weller*, 15 Hun, 134.)

5. Creditor's bill—statements of husband, when inadmissible against wife. (*See Kennedy* agt. *McGuire*, 15 Hun, 70.)

6. Married woman—when estopped from denying the authority of her husband to act as her agent. (*See Treman* agt. *Allen*, 15 Hun, 4.)

7. Testimony of wife—inadmissible against the representatives of a deceased person, when the husband is interested. (*See Waver* agt. *Waver*, 15 Hun, 277.)

IMPRISONED DEBTOR.

1. An application by an imprisoned judgment debtor for his discharge, under article 6, title 1, chapter 5, part 2, Revised Statutes, will be denied, where it appears that a few days after his arrest he was adjudged a bankrupt, on his own petition. Such party cannot put it out of his power to obey the orders of the state court, and then ask that court to discharge him from imprisonment. (*Matter of Fitzgerald*, ante, 190.)

2. But if it should appear that, without any fault on his part and against his will, all the property which he had at the time of his arrest had been taken away from him, whilst imprisoned, the court

would not refuse him a discharge. (*Id.*)

See DISCHARGE.

Ravot et al. agt. *Guillaume*, ante, 308.

IMPRISONMENT.

1. On the 21st December, 1867, one Latorre was arrested by the sheriff on a warrant issued under the non-imprisonment act of 1831. On December thirty-first proceedings in bankruptcy were instituted against Latorre. On January 11, 1868, he was declared a bankrupt, and on February fourth of that year all his estate was transferred to an assignee in bankruptcy. In an action against the sheriff to recover damages for an escape of the prisoner which occurred in June, 1868, held, that the pending proceedings under the non-imprisonment act were, so far as the assignment for the discharge of Latorre from imprisonment was concerned, legally superseded by the adjudication in bankruptcy and the proceedings subsequent thereto; that even though he had not availed himself of the discharge to which he was entitled, but remained in custody at the time of the escape, that plaintiff was not entitled to recover damages therefor. (*Maas* agt. *O'Brien*, 14 Hun, 95.)

2. *Quare*, whether in an action for an escape the sheriff could insist that the warrant upon which the prisoner was committed was void, because issued before any action had been commenced against him. (*Id.*)

INDICTMENT.

1. The plaintiff in error was convicted of keeping and exposing for sale impure and unwholesome milk. The indictment commenced in the usual manner, and was in all respects regular to the first

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count, which was preceded by the words, "It was then and there presented as follows, that is to say: City and county of New York, ss.: The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oath present." Then followed the first count and then the second, which latter count was not directly preceded by any words showing it had been presented by the grand jury. Upon a writ of error to review the conviction, this omission was claimed to be a fatal defect.

Held, that as the indictment had not been demurred to, nor any motion made to vacate it, and as the defect was not pointed out until after judgment, and as the omission was in no degree prejudicial to the prisoner, that the objection should be overruled. (*Schrumpf* agt. *People*, 14 *Hun*, 10.)

2. The count alleged that the prisoner unlawfully held, kept and offered for sale, the impure milk, "against and in violation of the provisions of the sanitary code."

Held, that it was not necessary to set out the particular ordinance alleged to have been violated, especially as the objection was not taken until after judgment. (*Id.*)

3. Where an indictment has been found in a court of oyer and terminer, an order may be made in that court sending the case to the court of sessions for trial, without giving any notice to the accused. (*Myers* agt. *People*, 14 *Hun*, 416.)

4. The court of sessions has, since the passage of chapter 212 of the Laws of 1865, jurisdiction to try and convict a person indicted for robbery in the first degree. (*Id.*)

5. The defendant was indicted and committed for conspiring to obtain, by false and fraudulent pretenses, a promissory note for fifty dollars from one Haskell, the re-

presentations being that one Jennie McKee was with child by him, and that if he did not give the note, she would charge him as its father:

Held, that it rested upon the prosecution to prove that each of the representations were false, and that it was not incumbent upon the defendant to prove their truth. (*Babcock* agt. *People*, 15 *Hun*, 364.)

6. When the public prosecutor fails to prove some fact, on the trial, that is necessary to be proved in order to justify a conviction, his omission so to do must be then pointed out, and if it is not, it cannot be subsequently taken advantage of on appeal; but where there is in fact no legal proof of the offense charged in the indictment, it is the duty of the court to direct a verdict in favor of the accused; and if it fail to direct such verdict, it is the duty of the appellate court to reverse the judgment, even though the point was not raised upon the trial. (*Id.*)

7. Where two or more defendants are jointly indicted for a felony, either one is absolutely entitled to a separate trial if he demands it. (*Id.*)

INJUNCTION.

1. Action for, may be maintained by one or more of the persons assessed for a local improvement in behalf of themselves and others similarly situated, to restrain the collection and enforcement of the same. The fact that a portion of the persons assessed have paid their assessments does not prevent the maintenance of an action by the others to restrain further proceedings thereunder. (*Kennedy* agt. *City of Troy*, 14 *Hun*, 308.)

2. *It seems*, that without some security given before the granting of an injunction order, or without an order requiring some act on the part of the plaintiff

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- equivalent to the giving of security, such as a deposit of money in court, or unless the conduct of plaintiff has been such as to give ground for an action for malicious or vexatious prosecution, the defendant has no remedy for any damages which he may sustain from the issuing of the injunction. (*Palmer agt. Fbley*, 71 N. Y., 106.)
3. The undertaking to be given on the granting of a temporary injunction must conform, in terms or in substance, to the requirements of the Code (*sec. 222*), and the liability of the sureties is according to those terms. (*Id.*)
 4. There is no breach of the condition of the statutory undertaking, unless the court finally decide that plaintiff was not entitled to the injunction, or unless something occurs equivalent to such a decision. (*Id.*)
 5. An appeal from a judgment, restraining action on the part of defendant, and a stay of proceedings thereon, does not affect the validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution; it acts directly without process, and the stay only operates to prevent action on the part of plaintiff. (*Sixth Ave. R. R. Co., agt. Gth. El. R. R. Co.*, 71 N. Y., 430.)
 6. It seems, that the supreme court, so long as an action is pending therein on appeal from the special to the general term, has power to enforce obedience to its judgments, and a stay of proceedings pending the appeal does not prevent the exercise of this power. (*Id.*)
 7. An order of general term vacating an order requiring a party to show cause upon short notice, why he should not be punished for contempt, in violating an injunction awarded by final judgment is not appealable to this court. (*Id.*)
 8. A notice of an intention to violate a covenant in a deed creating an easement given by one succeeding to the title of the grantee to an owner of a lot for whose benefit the covenant was made, is sufficient to authorize the interference of a court of equity to restrain such violation; and if the intended violation is of a character to be entirely harmless, it devolves upon the defendant to show it. (*Lattimer agt. Livermore*, 72 N. Y., 174.)
 9. The fact that the owner of another lot, who acquired title under a deed containing the same covenant, has violated it, is no defense to such an action; it does not release defendant from the performance of the covenant in his deed, so long as it remains of any value to the plaintiff. (*Id.*)
 10. The report of a referee assessing the damages in consequence of an injunction, when duly confirmed, is, in the absence of fraud, conclusive upon the sureties to the undertaking given on the granting of the injunction, although they had no notice of the proceedings. It is, however, the safer and fairer course to give the sureties notice. (*Jordan agt. Volkenning*, 72 N. Y., 300.)
 11. It seems that an injunction issued at the suit of a third person against one of the parties to a contract, restraining him from bringing an action thereon within the time limited by the contract, does not suspend the running of the limitation, or relieve the party from forfeiture under it. (*Wilkinson agt. F. Nat. Fire Ins. Co.*, 72 N. Y., 499.)

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12. The provision of the Code (*old Code, sec. 105; new Code, sec. 406*), saving the rights of parties under the statute of limitations when they are stayed by injunction, applies only to cases governed by the statute; it has no application to a limitation prescribed by contract. (*Id.*)
13. A policy of insurance contained a provision that no suit for the recovery of any claim thereunder should be sustainable unless commenced within twelve months after loss or damage. In an action upon the policy, wherein this provision was set up by defendant as a bar, to avoid the defense plaintiff showed that in an action brought by a third person against the holders of the policy and the insurance company, an injunction order was granted, restraining the company from *paying* and the holders from *receiving* the loss or damage arising under the policy: *Held*, that the injunction did not restrain the bringing of an action upon the policy. (*Id.*)
14. An injunction order, unless the words are clear, will not be construed as restraining acts which will be beneficial to the plaintiff. (*Id.*)
- agt. *North American Life Insurance Co., ante, 160.*)
2. A proceeding to wind up and dissolve a corporation and distribute its effects was specially provided for by the act (*Laws of 1853, chapter 463, section 11*), and, consequently, no action can now be maintained by a creditor or a stockholder under the Revised Statutes for a similar object. What a creditor or a stockholder could not do before the attorney-general and the court have acted under the statute of 1853, it ought not to be allowed to do after such action (*See Attorney-General agt. The Continental Life Insurance Company, 53 How., 16*). (*Id.*)
3. Under the Revised Statutes, when an action had been brought to dissolve and distribute the assets of an insolvent corporation, the remedy of every creditor was in that suit and proceeding only, and in the district in which the same was pending, and the same rule applies in proceedings to dissolve and distribute the assets of an insolvent corporation under the act of 1853. (*Id.*)
4. Where the business of an insurance company had been closed and a receiver thereof appointed, pursuant to the provision of chapter 902 of the Laws of 1869, an application was made to the special term by the company to have its assets taken from the receiver and returned to it and to permit it to again transact business: *Held*, that the authority of the special term to grant such application is gravely questioned and will not be assumed. (*Attorney-General agt. Atlantic Mutual Life Insurance Co., ante, 391.*)

INSURANCE COMPANY (LIFE).

1. The supreme court, in special proceedings pending before it for the purpose of distributing the effects of a dissolved corporation, *i. e.* (a life insurance company), (pursuant to chapter 463, Laws of 1853, and chapter 902, Laws of 1869), has power to enjoin an action brought by a policyholder of such corporation against the receiver appointed in such special proceedings for the purpose of ascertaining and declaring the debts and obligations of the corporation, and for the distribution of its assets. (*Attorney-General*
5. Nor, under such circumstances, will a reference be ordered to report the facts to the court, as a reference had already been had under the statute (the actuary being the officer specially charged

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with such an investigation), and his report having been made which stands confirmed by both the special and general term, (*Id.*)

6. *It seems*, that if the order appointing a receiver had been made because a large sum of money had been lost by a robbery, and after such appointment the money was returned, the court, by virtue of its general power in the administration of justice, might, in that or a similar case, interfere. But the reason or cause for such interference must be extraordinary. (*Id.*)
7. The peculiar facts and circumstances connected with the various proceedings in this case fully discussed in the opinion. (*Id.*)

INTERPLEADER

1. In an action of claim and delivery the third subdivision of section 122 of the Code, giving the court discretion to substitute for the defendant in the action, a party who makes a claim against the defendant for the property, is necessarily to be interpreted in connection with the two hundred and sixteenth section, which provides that if the property taken in an action of claim and delivery be claimed by any other person than the defendant such person shall make an affidavit of his title to the property, and the right to the possession of it, stating the ground of such right and title and serve the same upon the sheriff; after which, by the provisions of the section, it is made incumbent upon the plaintiff to indemnify the sheriff against such claim by the undertaking therein provided for. (*Lynch* agt. *St. John*, ante, 144.)
2. The property clerk of the New York Municipal Police Department has no right to retain property from its rightful owner after the prosecution which gave rise to his possession has ceased; and in case of replevin proceedings he must, like any other public officer, obey the lawful order and process of the court. He cannot make a conditional compliance. If, however, there be any reason why the property, for public purposes, should remain in the possession of the property clerk, his course is to apply to the court to control its own process. (*Id.*)
3. An order directing an interpleader is appealable. (*Id.*)
4. The plaintiffs alleged that, by a resolution of their board, the county treasurer was authorized to borrow \$20,800.44; that, pretending to act thereunder, he issued seventy-three notes in the name of the county, amounting to \$ 88,631; that of these notes only \$20,800.44 were valid; that each of the defendants held some of the notes; that several had commenced separate actions, and the others intended to do so; that the valid were distinguishable from the invalid notes; that they were willing to pay the \$20,800.44, and prayed that the defendants might be restrained from prosecuting separate actions, and for an interpleader between them and a surrender of the invalid notes:
Held, that the action could not be sustained as a bill of interpleader, because the plaintiffs denied that they owed the defendants what they severally claimed, and because the defendants did not claim the same debts, but distinct and several debts. (*Super-visors of Saratoga* agt. *Deyo*, 15 *Hun*, 526.)
5. That it could not be sustained as a bill *quia timet*, because the causes of action, being on notes, would be barred in six years, and plaintiffs could produce, on any trial, any evidence on which they now relied. (*Id.*)

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6. That it could not be sustained as a bill to prevent a multiplicity of suits, because the defendants did not all stand in the same position toward the plaintiff, and the success or defeat of one would not be the success or defeat of all. (*Id.*)
2. It is not necessary that the person to whom the judge is related should be technically a party to the action. (*Id.*)

JOINDER.

1. Of sureties and appellants, a parties defendant in an action on an undertaking on appeal—improper where appellants are not parties to the undertaking. (*See Delancey agt. Stearns, 14 Hun, 50.*)

JOINT DEBTOR.

1. This action was brought against one B. and others to compel a contribution for losses alleged to have been sustained by plaintiffs on a joint undertaking between himself and the defendants. After the commencement of the action B. died, and plaintiff, setting forth B.'s death, that he was a resident of California, and had left no property within this state, so that no personal representative could be appointed in this state, applied for leave to file a supplemental complaint, and asked leave to omit his name therefrom.

Held, that the application was rightly granted. (*Angell agt. Lawton, 14 Hun, 70.*)

JUDGES.

1. After a corporation has been dissolved, any order relating thereto made by a judge who is related to a stockholder of the company within the ninth degree is not absolutely void, but is voidable; the relationship being conceded, the court is bound, on such objection being taken by a stockholder, to set the order aside. (*Matter of Dodge & Stevenson Mfg. Co., 14 Hun, 440.*)

8. Where a judicial officer has not such an interest in a cause or matter as that the result must necessarily affect his personal or pecuniary interest, or where his interest is minute, and he has so exclusive a jurisdiction, by Constitution or statute, that his refusal to act in the cause or matter will prevent any proceeding in it, he may act so far as that there may not be a failure of remedy. (*In re Ryers, 72 N. Y., 2.*)

4. The provision of the statute (2 R. S., 275, sec. 7) declaring that no judge shall sit in a case where he is interested, is as much affected by the necessity existing or created by the conferment of exclusive jurisdiction by another statute as is the similar rule of common law. (*Id.*)

5. The authorities as to disqualification of judges because of interest, both at common law and under the statute, collated and discussed. (*Id.*)

JUDGMENT.

1. The F. & M. Bank of Rochester holding a note for \$1,000, made by S. & M. Hutchins, delivered the same to Stewart, one of the directors, who recovered a judgment in his own name for \$1,140 damages and \$22.80 costs, which costs Stewart claimed to have paid to his attorneys. This action was brought by the assignee in bankruptcy of the bank against Stewart and the sheriff, to compel the latter to pay over the whole amount of the judgment (\$1,162.80) which he had collected and held in his hands. The case was tried before a justice of the supreme court, without a jury, and judgment was entered in favor of the plaintiff September 15, 1877, di-

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recting the whole amount to be paid to him. No evidence was given upon the trial to show that Stewart had paid the twenty-two dollars and eighty cents to his attorney. Upon a motion made by defendant after the entry of the judgment, it was ordered by the judge before whom the action was tried, that the judgment be amended so as to direct that as to the twenty-two dollars and eighty cents the plaintiff should hold the same in trust for Stewart, and pay it over to him upon demand:

Held, that the special term had no power to alter the judgment upon motion; that the proposed change related to the merits, and was covered by the decision already made; that, if proper, such change could only be made after a rehearing before the trial judge upon the case being sent back to him, or after a review by an appellate court. (*McLean* agt. *Stewart*, 14 *Hun*, 472.)

2. In a proceeding under section 875 of the Code, to bring in and have judgment against a joint debtor, made a party to but not served with process in the original action, it appeared that pending the proceeding the judgment had been assigned by the plaintiff to one Mack:

Held, that the fact of the assignment constituted no defense; that the assignee might, by motion, have been brought in as plaintiff, or that he might continue the proceeding in the name of the original plaintiff. (*Merchants' Bank* agt. *Waitzfelder*, 14 *Hun*, 47.)

3. The holder of a promissory note recovered a judgment thereon against the maker, and an accommodation indorser, and an execution thereon was issued to the sheriff. Subsequently other judgments were recovered against the maker, and executions placed in the hands of the sheriff. A levy was made on personal property of

the maker, but insufficient in amount to cover the first judgment. Subsequently the accommodation indorser paid the holder the amount of the first judgment and took an assignment thereof. In an action to determine to whom the money realized by the sheriff's sale should be paid, *held*, that the payment of the judgment by the accommodation indorser and the taking of an assignment thereof by him, did not operate to extinguish the same, and that he was entitled to have the money in the hands of the sheriff applied upon it. (*Marsh* agt. *Benedict*, 14 *Hun*, 317.)

4. In an action against a sheriff for neglecting to collect and return an execution, plaintiff must show a valid judgment upon which the execution was issued. (*Forsyth* agt. *Campbell*, 15 *Hun*, 235.)

5. A sheriff cannot, however, in such an action take advantage of a mere irregularity in a judgment rendering it voidable but not void. (*Id.*)

6. To prove the existence of a judgment upon which the execution was issued, plaintiff produced a certified copy of an order for judgment, made by the county court, directing the reversal of a judgment of a justice of the peace, and directing judgment for the defendant (the present plaintiff) for his costs, \$27.26, the amount of the alleged judgment:

Held, that this was not sufficient to prove the existence of a valid judgment. (*Id.*)

7. A judgment entered in an action where the service of the summons was by publication — and where the defendant was not during the progress of the suit, within the territorial jurisdiction of the court rendering it — provided that be the place of his citizenship and domicile — where such service is the method prescribed by the law

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of that jurisdiction, as a substitute for personal service — though the defendant has not voluntarily appeared — is effectual to dissolve the marriage contract, and prevalent and effectual everywhere. (*Baker* agt. *People*, 15 *Hun*, 256.)

8. The defendant was arrested under an execution issued on a judgment, whereupon he noticed a motion to set aside the arrest, on the ground that he had not been arrested on an order before the entry of the judgment. The plaintiff, without waiting for the decision of the motion, consented to his release, upon his agreeing not to bring an action for false imprisonment:

Held, that the consent of the plaintiff to his release did not amount to a satisfaction of the judgment. (*Rowe* agt. *Guilleaume*, 15 *Hun*, 462.)

9. Where, in an action to recover possession of personal property, plaintiff claimed a special interest as mortgagee, defendants being the general owners, with a right to redeem; *held*, that the proper judgment in favor of the plaintiff was for a return of the property, or for its value, fixing it at the amount of plaintiff's interest, — *i. e.*, the amount due on the mortgage, not for the full value of the property, with damages for the detention. (*Allen* agt. *Judson*, 71 *N. Y.*, 77.)

10. Where an action is brought by a judgment creditor on behalf of all other judgment creditors, as well as himself, to set aside fraudulent conveyances of the debtor's real estate, a judgment is not improper adjudging the appointment of a receiver to take a conveyance of and to sell the real estate. (*Shand* agt. *Hanley*, 71 *N. Y.*, 820.)

11. An appeal from a judgment, restraining action on the part of defendant, and a stay of proceedings thereon, does not affect the

validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution; it acts directly without process, and the stay only operates to prevent action on the part of plaintiff. (*Sixth Ave. R. R. Co.*, agt. *Gsl. El. R. R. Co.*, 71 *N. Y.*, 480.)

12. *It seems*, that the supreme court, so long as an action is pending therein on appeal from the special to the general term, has power to enforce obedience to its judgments, and a stay of proceedings pending the appeal does not prevent the exercise of this power. (*Id.*)

13. In an action for *crim. con.* the divorced wife of the plaintiff is a competent witness for him; the judgment record in the action for divorce is competent evidence to show the status of the divorced wife and her competence as a witness. (*Wottrich* agt. *Freeman*, 71 *N. Y.*, 601.)

14. Such judgment cannot be attached for error or irregularity. (*Id.*)

15. In an action to determine conflicting claims to policy of life insurance, when provision in judgment enjoining collection of another judgment against the insurance company upon the policy proper. (*See Barry* agt. *Brune*, 71 *N. Y.*, 261.)

16. What is sufficient service of notice of judgment in order to limit time for appeal. (*See Chase* agt. *Bibbins* [Mem.], 71 *N. Y.*, 590.)

17. Where a judgment is recovered against, and paid by, a municipal corporation, for injuries caused by an obstruction unlawfully placed by another in one of its streets, or

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negligently permitted to remain there without guards or lights, it may recover over against the person chargeable with the unlawful or negligent act the amount so recovered. (*City of Rochester agt. Montgomery*, 72 N. Y., 65.)

18. Where due notice of the bringing of the action against it is given by the corporation to the wrongdoer, with a claim that he will be held liable to indemnify against any recovery therein, the judgment against it is conclusive in the action by it against him, if it is shown that he unlawfully created or negligently left the obstruction, both as to the liability of the corporation to the person injured, and as to any matter which might have been urged as a defense, and so as to contributory negligence on the part of the person injured. (*Id.*)
19. Where a bankrupt, subsequent to his discharge in bankruptcy, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge. (*Dewey agt. Moyer*, 72 N. Y., 70.)
20. A judgment rendered by a court having power lawfully conferred to deal with the general subject involved in the action, and having jurisdiction of the parties, although against the facts or without facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally. (*Hunt agt. Hunt*, 72 N. Y., 218.)
21. A judgment against a deceased person, although disputed or rejected by his personal representatives, need not be sued over in order to authorize a decree for its payment by the surrogate. (*Mc Nutty agt. Hurd*, 72 N. Y., 518.)
22. The surrogate may, upon application for such a decree, inquire into and pass upon alleged payments made to apply upon the judgment, and determine the amount due thereon, and may also determine who is the owner of the judgment and entitled to the money; but he has no jurisdiction to determine whether there has been an accord and satisfaction, or whether the estate is entitled in equity to a release or discharge, either in whole or in part, from the judgment. (*Id.*)
23. *It seems*, that the remedy of the executors or administrators to prevent the enforcement of the judgment, and to obtain relief where the surrogate has no jurisdiction to grant it, is by resort to the proper judicial tribunals. This may be had either before or after a decree for the payment of the judgment, and a restraining process obtained either to prevent the decree or its enforcement. (*Id.*)

JUDGMENT DEBTOR.

1. When the statute (*sec. 376 of the Code of Procedure*) speaks of "tenants of real property owned by the judgment debtor," it means *his* tenants, and does not apply to persons holding under a deed in hostility to him, and those who claim through him. (*Leonard agt. Leonard*, *ante*, 97.)
2. The judgment debtor died leaving the judgment unpaid. At his death he was seized of certain real estate in the city of New York. He left a widow and two children, and by his will his widow was to have a monthly allowance from the income of his estate in lieu of dower, and the principal of the estate was given to his children. The real estate was sold by the municipal corporation for taxes, and a lease for 1,000 years was executed to Charles Reed. The proceedings are under section 376 of the Code, and the summons has been served upon the widow, her two children and Reed:

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Held, that the proceedings as to Reed could not be upheld, as he does not hold as a tenant of the judgment debtor, but under a deed made in hostility to him.

Held, further, that the interest of the heirs or devisees is too remote and trifling to authorize these proceedings. (*Id.*)

3. The right of judgment debtors discharged from their debts by proceedings in bankruptcy to have a judgment against them, canceled of record after the lapse of two years since their discharge was granted, sustained notwithstanding the fact that the judgment was a lien upon certain real estate conveyed by the bankrupts. The reasons stated. (*Fellows agt. Kirtledge et al., ante*, 498.)

See OFFER.

Riggs agt. Waydell, ante, 247.

JUDICIAL DISTRICT.

See SUPREME COURT.

Attorney-General agt. North American Life Insurance Co., ante, 160.

JUDICIAL SALES.

1. The jurisdiction given to the court under the provisions of the Revised Statutes, in reference to the sale of the real estate of a lunatic (2 *R. S.*, 54 *et seq.*), being a special statutory one, can only be exercised as the statute directs. (*In re Valentine*, 72 *N. Y.*, 184.)
2. The requirement of the statute (*sec.* 12) that the petition "*shall* be referred," &c., is substantial and cannot be dispensed with; an omission to refer constitutes a fatal defect in proceedings under the statute. (*Id.*)
3. A purchaser under such defective proceedings may move to have
- his title perfected by new or amended proceedings, or to have the purchase-money refunded. (*Id.*)
4. As to whether there is any substantial difference in the steps required to be taken by the act of 1864, in reference to such sales (*chap.* 417, *Laws of 1864*), from those required by the Revised Statutes, *quære.* (*Id.*)

JURISDICTION.

1. The superior court of the city of New York has power and jurisdiction to entertain and grant an application, to have a record of the proceedings in such court, admitting the applicants to citizenship of the United States, perfected by an entry *nunc pro tunc* of the fact of such admission in the minute book of the court, provided a proper case has been made out for its exercise. (*Matter of Christern, ante*, 5.)
2. As a general rule the court will not permit a party to suffer through any delay or mistake of its own, nor by the delay or mistake of its officers. (*Id.*)
3. It is only when the rights of third persons which have in the meantime been acquired in good faith intervene, that relief will not be given; but even such third persons cannot rely upon a mere technical error which leaves no doubt about what was intended. (*Id.*)
4. A state court has jurisdiction of an action to determine the rights of the respective parties under an agreement by defendant with plaintiff, for the exclusive right to have and perform a certain play. (*Widmer agt. Greene, ante*, 91.)
5. The marine court of the city of New York is a court of record, to

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and for all intents and purposes, and has jurisdiction of all the proceedings authorized by the act to abolish imprisonment for debt, passed in 1831, commonly called the Stilwell act. (*People ex rel. Louenbein* agt. *Donohue*, ante, 152.)

6. A county judge has jurisdiction in proceedings supplementary to execution based on judgments recovered in the supreme court where the judgment debtor resides or has a place of business in the county, or where a transcript has been filed when the judgment was not recovered in that county. (*Orill* agt. *Kornmeyer*, ante, 276.)

See SUPREME COURT.

Attorney-General agt. *North American Life Insurance Co.*, ante, 160.

7. Upon an appeal from an order denying a motion to dismiss the summons and complaint, on the ground that both the plaintiff and defendant were non-residents, and that the subject-matter of the action was not situated, nor did the cause of action originate in this state:

Held, that the question as to the jurisdiction of the court could not be tried on a motion. (*Johnson* agt. *Adams Tobacco Co.*, 14 *Hun*, 89.)

8. That if the want of jurisdiction appeared on the face of the complaint, it should be taken advantage of by demurrer; and if it did not so appear, it should be set up in the answer. (*Id.*)
9. Subdivision 9 of section 5182 of the bankrupt act provides, that whoever "within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit, from any person, any goods or chattels, with

intent to defraud," shall be punishable by imprisonment:

Held, that conceding that the United States courts have exclusive jurisdiction over offenses created by United States statutes, the passage of this section did not deprive the courts of this state of their jurisdiction over the general offense of obtaining goods by false pretenses. (*Abbott* agt. *People*, 15 *Hun*, 437.)

10. The objection that a county court has not jurisdiction over the person of the defendant must be raised at the first opportunity, and is waived by his appearing in the action and pleading to the merits. (*Dake* agt. *Miller*, 15 *Hun*, 356.)

11. The entire original jurisdiction over assignments for benefit of creditors, vested in the county court—the supreme court has no power thereover by petition under chapter 466 of the Laws of 1877, as amended by chapter 818 of the Laws of 1878. (*See Matter of Nicholas*, 15 *Hun*, 317.)

12. If once acquired—the proceedings cannot be attacked collaterally. (*See Allen* agt. *Utica, Ithaca and Elmira R. R. Co.*, 15 *Hun*, 80.)

13. Of commissioners of highways—cannot be questioned by referees appointed to hear an appeal from an order made by them. (*See People ex rel. Bailey* agt. *Sherman*, 15 *Hun*, 575.)

14. Special term has power to order that a judgment debtor imprisoned under order of arrest be discharged unless plaintiff issue body execution. (*See N. Y. G. and I. Co. agt. Rogers*, 71 *N. Y.*, 377.)

15. Where a judicial officer has not such an interest in a cause or matter as that the result must necessarily affect his personal or pecuniary interest, or where his interest is minute, and he has so exclusive a jurisdiction, by the Consti-

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- tution or statute, that his refusal to act in the cause or matter will prevent any proceeding in it, he may act so far as that there may not be a failure of remedy. (*In re Ryers*, 72 N. Y., 2.)
16. The provision of the statute (2 R. S., 275, sec. 7) declaring that no judge shall sit in a case where he is interested, is as much affected by the necessity of existing or created by the conferment of exclusive jurisdiction by another statute as is the similar rule of common law. (*Id.*)
17. A state court has jurisdiction of an action by an assignee in bankruptcy to recover a debt due the bankrupt. (*Kidder* agt. *Horrobin*, 72 N. Y., 159.)
18. The amendment of 1874 to section 1 of the bankrupt act, providing that the court having charge of the estate of a bankrupt, may direct that any of his legal assets or debts, not exceeding \$500, be collected in the courts of the state, did not have the effect to confer or take away jurisdiction of the state court, but simply to allow the federal courts to decline to entertain actions at common law in which the assignee is a party, where the debt demanded is less than the amount which determines the jurisdiction of these courts in other cases. (*Id.*)
19. A suit by an assignee in bankruptcy to collect a debt due the bankrupt, is not a matter of proceeding in bankruptcy within the meaning of section 711 of the United States Revised Statutes, declaring the jurisdiction of the state courts to be exclusive in the cases specified. (*Id.*)
20. An intention to deprive state courts of jurisdiction, will not be inferred from doubtful language; nor will the words of a statute be extended beyond their strict meaning to accomplish this result. (*Id.*)
21. The jurisdiction given to the court under the provisions of the Revised Statutes, in reference to the sale of the real estate of a lunatic (2 R. S., 54 *et seq.*) being a special statutory one, can only be exercised as the statute directs. (*In re Valentine*, 72 N. Y., 184.)
22. The requirement of the statute (sec. 12), that the petition "shall be referred," &c., is substantial and cannot be dispensed with; an omission to refer constitutes a fatal defect in proceedings under the statute. (*Id.*)
23. The jurisdiction of a court of another state in which a judgment has been rendered is always open to inquiry in the courts of this state, and the judgment may be also questioned collaterally for fraud. (*Hunt* agt. *Hunt*, 72 N. Y., 217.)
24. To authorize a disregard of the judgment because of fraud, there must have been fraudulent allegations and representations, designed and intended to mislead, with knowledge of falsity, and resulting in damaging deception. (*Id.*)
25. That a party not competent as a witness under the laws of the state was permitted to testify in his own behalf is not a fraud, nor does it affect the jurisdiction, and so does not afford reason for questioning the judgment collaterally. (*Id.*)
26. Jurisdiction of the subject-matter of an action is a power to adjudge concerning the general question involved therein, and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a good cause of action in the plaintiff therein. (*Id.*)
27. A judgment rendered by a court

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having power lawfully conferred to deal with the general subject involved in the action, and having jurisdiction of the parties, although against the facts or without facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally. (*Id.*)

28. And so where an action for divorce is brought in a court having power to entertain such an action, and which has jurisdiction of the parties, the court has power to give judgment, although plaintiff fails to make out a cause for divorce as prescribed by the laws of the state; and this failure cannot be shown collaterally to avoid the judgment while it stands unreversed, whether the judgment is availed of in the state where granted or in a sister state. (*Id.*)

29. Of their own jurisdiction, so far as it depends upon municipal laws, the courts of every country are exclusive judges. (*Id.*)

30. The decisions also of the tribunals of another state as to the true construction of its laws, are binding upon the courts of this state. (*Id.*)

31. Jurisdiction of the person of a defendant in an action for divorce may be acquired by a court of the state in which he or she is a domiciled citizen, by such proceedings in the nature of service of process of the court as the law of the state has made equivalent to personal services within its jurisdiction; so long as the citizen retains that relation to the state, he owes it allegiance and is subject to its laws, and this subjection he cannot throw off by a temporary or prolonged absence from the state. (*Id.*)

32. A judgment of divorce, therefore, rendered by the court of another state, against a domiciled citizen thereof, upon a substituted

service of process such as the law of the state has authorized in the case of an absent defendant, is valid *in personam* so as to affect a dissolution of the marriage contract; and is conclusive upon the defendant in the courts of this state, although he was not within the territorial jurisdiction during the progress of the suit and did not appear therein. (*Id.*)

33. Where an executor in good faith resists the charging of a legacy upon the residuary estate in his hands, and shows that there exists a real question of fact or law, a surrogate has no jurisdiction to decide the question upon settlement of the executor's accounts. (*Bevan* agt. *Cooper*, 71 N. Y., 318.)

34. On a common law *certiorari* to review the judicial action of a board of commissioners or an inferior officer, the court is not confined to the mere question of jurisdiction, but will look into the proceedings, and if the adjudication made is unsupported by any evidence it will be reversed. (*People ex rel. Clapp* agt. *Board of Police*, 72 N. Y., 451.)

35. A judgment against a deceased person, although disputed or rejected by his personal representatives, need not be sued over in order to authorize a decree for its payment by the surrogate. (*McNulty*, agt. *Hurd*, 72 N. Y., 518.)

36. The surrogate may, upon application for such a decree, inquire into and pass upon alleged payments made to apply upon the judgment and determine the amount due thereon, and may also determine who is the owner of the judgment and entitled to the money; but he has no jurisdiction to determine whether there has been an accord and satisfaction, or whether the estate is entitled in equity to a release or discharge, either in whole or in part, from the judgment. (*Id.*)

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37. The provision of the Civil Code (*sec.* 1308), authorizing the appellate court to require the appellant to file a new undertaking, in case of the insolvency of one of the sureties, is not imperative; if the remaining surety is solvent and abundantly able to satisfy the judgment, or if the judgment is otherwise well secured, and the appeal is likely to be heard and disposed of without delay, the court may, in its discretion, refuse the order. (*Dering* agt. *Metcalf*, 72 N. Y., 613.)

JURY.

1. It is no error after a jury has come into court and delivered their verdict (the form of which showed they intended to add interest thereto) for the court to send them back to their room to calculate the interest. (*Mark* agt. *Hudson River Bridge Company*, *ante*, 108.)
2. Where, after a jury has been impaneled and a witness sworn, one of the defendants is ordered to be tried separately, the jury and witness must be resworn. (*Babcock* agt. *People*, 15 Hun, 347.)
3. The bringing of an action of a distinctly equitable character is a waiver, so far as the plaintiff is concerned, of the right of trial by jury, although upon the facts he may be entitled to either legal or equitable relief; and in determining the mode of trial, the court may, as to him, be governed by the nature of the action, as stated in the complaint. (*Davison* agt. *Associates J. Co.*, 71 N. Y., 384.)
4. It seems, that the rule as to the defendant is different; that he cannot be deprived of a jury trial, in a proper case, because the plaintiff has demanded equitable instead of legal relief. (*Id.*)
5. Where one called as a juror upon a criminal trial, on challenge for

principal cause, testifies that he has formed and expressed an opinion, but that he believes he can render an impartial verdict, according to the evidence, unbiased and uninfluenced by the previously formed opinion, he is competent as a juror, under the act in relation to challenges of jurors (*Chap.* 475, *Laws of 1872*; *chap.* 437, *Laws of 1873*). (*Phelps* agt. *People*, 72 N. Y., 335.)

JUSTICE'S COURT.

1. Where in an action commenced in a justices' court, in which a counter-claim has been interposed, the defendant moves that the action be discontinued, on the ground that the amount in dispute exceeds that over which the justice has jurisdiction, and such action is accordingly dismissed, and a new one brought in the supreme court, the defendant is estopped from claiming in the latter action that the justice had jurisdiction in the former one and that he is therefore entitled to costs. (*Bradner* agt. *Howard*, 14 Hun, 420.)
2. Under subdivision 5 of section 866 of the old Code, authorizing the county court to allow either party to amend his pleadings upon such terms as shall be just, in cases where a new trial may be had in that court, the court cannot allow an answer, interposed in the justice's court, consisting of a general denial, to be amended by inserting therein new and affirmative defenses, such as payment, set-off or counter-claim. (*Id.*)
3. *Semble*, that no amendments should be allowed which will entirely change the issues in the court below, but only such as will enable the parties fully and fairly to try such issues. (*Reno* agt. *Millsbaugh*, 14 Hun, 228.)

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4. This action was brought in a justice's court to recover upon a claim originally held by one Bogart against the defendant, and by Bogart transferred to the firm of L. S. Lawrence & Co. This firm was composed of the plaintiffs and L. S. Lawrence. Upon the trial, defendant moved for a nonsuit, on the ground that L. S. Lawrence should have been named as a plaintiff.

Held, that the motion was properly denied; that the objection to the nonjoinder of proper parties plaintiff should have been taken by answer; and, not having been so taken, was waived. (*Frazier agt. Gibson*, 15 Hun, 37.)

5. Sections 144, 147 and 148 of the Code are, by subdivision 15 of section 68, made applicable to justices' courts. (*Id.*)
6. A justice of the peace, by failing to appear within one hour after the time to which the case has been adjourned, loses jurisdiction of the action, and the same is thereby discontinued. (*Flint agt. Gault*, 15 Hun, 213.)

JUSTICES OF THE PEACE.

1. The facts that a debtor is insolvent, that he has turned over to two creditors portions of his goods amounting to less than one-half of their respective debts; that he refuses to turn over any goods to the plaintiffs, or to pay the amount due to them, that he is selling off his stock in trade and not likely to continue his business, do not furnish sufficient evidence to authorize a justice of the peace to issue a warrant against him, on the ground that he has disposed, or is about to dispose, of his property, with intent to defraud his creditors. (*Horton agt. Funcher*, 14 Hun, 172.)
2. The plaintiff commenced an action against the defendant before

a justice of the peace and applied for a warrant of arrest, alleging in his affidavit that the defendant was a non-resident of the county, and that plaintiff "has, as he verily believes, a good cause of action against Samuel Sisson, for wrongful and fraudulent representations in the exchange of horses, by which the deponent was damaged to a large amount."

Held, that the affidavit did not state facts, as required by the statute; that plaintiff's belief that he had a good cause of action was not sufficient to authorize the justice to issue the warrant. (*Wells agt. Sisson*, 14 Hun, 267.)

LACHES.

1. A mere neglect to physically resist an illegal or unconstitutional exercise of an alleged power on the part of the state or of the municipal authorities, does not deprive the individual, when a right is claimed under such illegal or unconstitutional action, from insisting upon his rights. (*Matter of Cheesebrough*, ante, 460.)
2. Whether the doctrine of laches applies to the legal rights or should be restricted in its application to equitable rights only, *quære?* (*Id.*)

LANDLORD AND TENANT.

1. Where it is stipulated that the tenant shall quit on ten days' notice, such notice must be precise and definite as to the time when the surrender is required to be made. A notice requiring the tenant to surrender possession "as soon as practicable" is insufficient. (*People ex rel. Sanford agt. Gedney*, 15 Hun, 475.)

LATENT EQUITIES.

See MORTGAGE.

Bank for Savings agt. Frank, ante, 408.

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LAW AND EQUITY.

1. Where an action in equity has been referred, and the referee has made a report in which he has passed upon the question of costs, in accordance with which report the costs have been taxed and a judgment entered, the special term has no power to strike such costs therefrom upon motion; the remedy of the party aggrieved is by an appeal from the judgment. In actions at law the rule is different, and the court may, in such actions, amend the judgment by increasing or decreasing the amount of costs included therein, or it may strike them out altogether. (*Woodford agt. Bucklin*, 14 Hun, 444.)

LEAVE TO SUE.

1. The owner of a debt secured by mortgage, who holds an obligation or covenant for its payment or collection, given by a person other than the mortgagor, cannot enforce the obligation by action during the pendency of, or after judgment in an action to foreclose the mortgage, unless authorized by the court. (*Scofield agt. Doscher*, 72 N. Y., 491.)
2. The provisions of the Revised Statutes in reference to judgments in and the parties to foreclosure suits (2 R. S., 191, secs. 152, 153, 154), are parts of one system, and are to be construed together, the object being to confine all the proceedings for the collection of the mortgage debt to one court and one action. (*Id.*)
3. Accordingly *held*, that an action was not maintainable, brought without leave of the court, to recover a deficiency arising on foreclosure sale against the executor of a grantee of a portion of the mortgaged premises, who had covenanted to pay a portion of the mortgage. (*Id.*)

4. Also, *held*, that the lack of authority to sue was not a defense necessary to be pleaded and proved affirmatively by defendants, but as there was no right of action without the authority, it was for the plaintiff to allege, or at least to prove it, in order to maintain his action. (*Id.*)

LIEN.

1. A lien exists in favor of a vendee when the purchase-money, or a part of it, has been prematurely paid by him, before a conveyance of the land. (*Clark agt. Jacobs*, ante, 519.)
2. Such lien will be protected, in favor of the vendee, against every one but a bona fide purchaser without notice of the lien. (*Id.*)
3. But upon a purchase of land, which involves a breach of trust, as when a trustee himself undertakes to purchase the trust estate for his own advantage, no such lien arises in his favor for moneys paid. (*Id.*)
4. Nor does such lien exist when a purchaser has, by his own default, abandoned the contract of purchase. (*Id.*)
5. Where persons entered into a contract for the purchase and sale of land, and a part of the purchase-money was paid by the vendee, and a conveyance was executed and placed in escrow, to be delivered when the residue of the purchase-money should be paid, and the lands were afterwards conveyed away, so that the contract of purchase could not be fulfilled: *Held*, that the vendee could follow the land in the hands of persons who had taken title with knowledge of the vendee's equity, and that it was not necessary, in order to invoke equitable relief and enforce the lien out of and against the land, that the vendee

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should tender the balance of the purchase-money; that, under the circumstances, a tender was excused. (*Id.*)

6. Where a purchaser of land takes the title with notice of the equitable rights of a third person, he holds the property subject to such equitable rights (*Brown* agt. *Goodwin*, 1 *Abb. N. C.*, 452). (*Id.*)
7. When upon an appeal to the court of appeals from a judgment of the general term, money is deposited in court in lieu of an undertaking, such deposit is subject only to the decision of the appeal, to which it relates, and upon the reversal of the judgment the fund is released from all liens, except those created by judgment or assignment. The plaintiff is not entitled, on showing that the defendants who made such deposit is insolvent to have the money held as security for the payment of any judgment he may recover on a new trial. (*Jordan* agt. *Volkening*, 14 *Hun*, 118.)

LIMITATION OF ACTION.

1. No mere lapse of time after the commencement of an action at law will bar the action under the statute of limitations; the statute can in no case furnish a defense, unless the action was barred before its commencement. (*Evans* agt. *Cleveland*, 72 *N. Y.*, 486.)
2. So, also, no mere lapse of time will absolutely defeat an application for the continuance of such an action in the name of the representative of a deceased party. (*Id.*)
3. The parties to a contract may provide by express stipulation for a shorter limitation to actions thereon than that fixed by the general law. (*Wilkinson* agt. *Nat. F. Ins. Co.*, 72 *N. Y.*, 499.)

4. *It seems*, that an injunction issued at the suit of a third person against one of the parties to a contract, restraining him from bringing an action thereon within the time limited by the contract, does not suspend the running of the limitation, or relieve the party from forfeiture under it. (*Id.*)

5. The provision of the Code (*Old Code*, sec. 105; *New Code*, 406), saving the rights of parties under the statute of limitations when they are stayed by injunction, applies only to cases governed by the statute; it has no application to a limitation prescribed by contract. (*Id.*)
6. The statute of limitations does not run after an adjudication in bankruptcy against the claim of a creditor of the bankrupt, which was not barred by the statute at that time. (*Von Sach* agt. *Krete*, 72 *N. Y.*, 848.)

LIMITED DIVORCE.

1. If, in an action brought by a wife for a limited divorce, on the ground of cruel and inhuman treatment, the husband wishes to show that she has forfeited her right to such relief by her own ill-conduct, or that his offenses have been condoned, he must set up such defenses in his answer. (*Roe* agt. *Roe*, 14 *Hun*, 612.)

LIMITED PARTNERSHIP.

See ASSIGNMENT.

Whitecomb et al. agt. *Foule et al.*, ante, 365.

LIS PENDENS.

See CAUSE OF ACTION.

Smith agt. *Smith*, ante, 316.

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LUNATIC.

1. The selection of a committee of a lunatic by a referee appointed for that purpose, is a matter of judicial discretion with which the court should not interfere, unless he has selected an improper person or one who is disqualified, or one whose situation is such as to warrant the belief that the interests confided to him may not be properly attended to. (*Matter of Page, ante*, 100.)
2. Whether a relative or stranger is to be preferred, should be determined in the particular case, in view of all the circumstances, and not by the application of any general rule, for there is none except that *heirs* or *next of kin* are *not disqualified* if the court or its officer in the exercise of a sound judicial discretion thinks proper to appoint one. (*Id.*)
3. *Matter of Owens* (5 *Daly*, 288) explained and limited. (*Id.*)
4. Although it is usual to require a petition for the appointment of a committee, of a person alleged to be of unsound mind, to be accompanied by the affidavit of a physician before the court will direct a writ *de lunatico inquirendo* to issue, yet the court may, in its discretion, dispense with such affidavit, and issue the writ upon the affidavit of a layman. The sufficiency of the allegations of the petition cannot be questioned after the return of an inquisition finding sufficient facts. (*Matter of Zimmer*, 15 *Hun*, 214.)

MANDAMUS.

See STATE PRINTING.

Weed, Parsons & Co. agt. Beach, ante, 470.

1. Where a railroad company fails to construct fences and cattle-guards as required by statute, a writ of mandamus may properly be is-

sued compelling it to construct and maintain the same. (*People ex rel. Garbutt agt. R. and S. L. R. R. Co.*, 14 *Hun*, 371.)

2. Any citizen of the state may apply, as a relator, for a writ of mandamus for that purpose. (*Id.*)
3. Where the company fails to comply with the requirements of such writ the court has power, under title 13 of chapter 8 of part 3 of the Revised Statutes, to impose such fine or imprisonment, or both, as the nature of the case may require. (*Id.*)
4. The remedy by peremptory mandamus cannot be invoked, unless there is a clear and unquestioned legal right. (*People ex rel. Slavin agt. Wendell*, 71 *N. Y.*, 171.)
5. Even where a case is made out in which a peremptory mandamus may be issued, where the validity of the relator's claim is disputed, it is within the discretion of the court whether to grant or refuse it. In the exercise of that discretion, it is the duty of the court to see that the rights of the relator are fully protected, and it may direct the issuing of an alternative writ where the facts relied upon by the relator are in dispute, where the parties wish to review the case upon appeal, or upon the suggestion of either party. (*Id.*)
6. In case the proper officers of a manufacturing corporation refuse to perform the duty imposed upon them by the provisions of the Revised Statutes (1 *R. S.*, 604, *sec.* 8), declaring that, if the election of directors of an incorporated company shall not be duly held on the day designated, "it shall be the duty of the president and directors * * * to notify and cause an election for directors to be held within sixty days," a stockholder has a remedy by mandamus to compel such performance. (*People agt. Cummings*, 72 *N. Y.*, 433.)

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7. The commissioner of public works of the city of New York, in pursuance of a resolution and ordinance of the common council, advertised for proposals for a street improvement. The relator was the lowest bidder, and his proposal was accepted. In proceedings by mandamus to compel the commissioner to enter into a contract, *held*, that if the relator established a clear legal right to the contract, he had a remedy at law by action against the city to recover damages, and so was not entitled as of right to a mandamus; that if the right was not clear, the writ was properly denied on that ground; that under the circumstances, the granting or refusal of the writ was a matter of discretion in the court below, with the exercise of which this court could not interfere. (*People ex rel. Lunney agt. Campbell*, 72 N. Y., 496.)

MARRIED WOMAN.

1. Where a married woman carries on business through the agency of her husband, to whom she has given a power of attorney, she may ratify and adopt any act of his in the business, even though such act was not within the letter of the power of attorney. (*Wilcox & Gibbs S. M. Co. agt. Elliott*, 14 Hun, 16.)

2. When a married woman, owning a saw-mill and carrying on business therein, through her husband as her agent, clothes him with apparent authority to purchase materials to repair the mill, she is estopped from disputing his authority to purchase such materials, so far as others have been induced to act upon the faith of it, although he has disregarded her instructions to purchase them of a particular person designated by her. (*Treman agt. Allen*, 15 Hun, 4.)

3. In order to charge the separate

estate of a married woman for services not rendered for the benefit of said estate, an agreement so to charge must be included in the original contract of hiring; an agreement by her to charge the value of past services upon her estate is insufficient. (*Eisenlord agt. Snyder* 71 N. Y., 45.)

4. In an action, upon contract, against a married woman, the burden is upon plaintiff, not only to prove the contract, and that it was made by her or her authorized agent, but that it was a contract she was capable of making. (*Nash agt. Mitchell*, 71 N. Y., 199.)

5. Where no express charge upon her separate estate is created by the contract it must be made to appear that it was in or about a trade or business carried on by her, or that it was for the benefit of such estate. (*Id.*)

6. The management of her landed property by a married woman — i. e., the receipt and disposal of the rents and income therefrom — is not the carrying on of a trade or business within the meaning of the statute authorizing married women to carry on trade or business. (*Id.*)

7. The promise of a married woman is valid when it is given as a part of a transaction, the purpose and end of which is to create for her a separate estate. (*Herrington agt. Robertson*, 71 N. Y., 280.)

MARINE COURT (N. Y.).

1. The marine court of the city of New York is a court of record, to and for all intents and purposes, and has jurisdiction of all the proceedings authorized by the act to abolish imprisonment for debt, passed in 1831, commonly called the Stilwell act. (*The People ex rel. Louenbein agt. Donohue*, ante, 152.)

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2. Under the provision of the Code (sec. 103) allowing a new action to be brought within a year after the reversal upon appeal of a judgment against plaintiff, in an action brought within the time prescribed by the statute of limitations in the marine and other inferior courts when the judgment of the marine court is reversed by the general term of the court of common pleas of New York, and by authority of that court an appeal is taken to this court, the plaintiff is not required to bring his second action within a year after the reversal by the common pleas, but may await the final determination of the appeal to this court; and, in case the reversal is affirmed, may bring suit within a year thereafter. (*Wooster agt. Forty-second St., &c., R. R. Co., 71 N. Y., 471.*)

MECHANIC'S LIEN.

1. A lien, by one who furnishes materials toward the erection, alteration or repair of a building in the city of New York, must be filed within *thirty days after the materials are furnished or supplied.* (*Gates agt. Buddenseick, ante, 198.*)

2. The defendant Beach entered into a contract with S. & B., by which the latter agreed to erect a house for the former; the contract reserving the right to Beach to retain moneys due to the contractors to pay for materials used by them. The plaintiffs entered into a contract with S. & B. to furnish brick, and delivered a portion of the brick thereunder. One of the plaintiffs testified that subsequently, doubting the solvency of the contractors, he called upon defendant, who agreed that if he (plaintiff) would keep him posted as to the amount due from S. & B., he (defendant) would keep back money enough to pay him; that he would "see him through." In

this action, brought to foreclose a mechanic's lien, the referee found that at the time of the filing of the lien nothing was due to S. & B., and nothing had been paid to them by the defendant with intent to avoid the lien law, and gave a personal judgment against the owner upon his alleged agreement with the plaintiffs.

Held, that as it appeared from the facts found by the referee that the plaintiffs acquired no lien upon the property by filing their notices of claim, they could not, in an action to foreclose their alleged lien, recover a personal judgment against the owner upon a separate and independent contract. (*Weyer agt. Beach, 14 Hun, 230.*)

3. That in any event the alleged contract made by the defendant and the plaintiff being a parol one, to answer for the debt of another, was void by the statute of frauds. (*Id.*)

4. In a lease executed by the owners of certain lands in Queens county, it was agreed, as part of its consideration, "that the improvements built, or to be built, upon the premises are to revert to the parties of the first part at the expiration of the lease;" and the lessees also agreed to keep such buildings insured for at least half their value, and in case of fire to devote the insurance money towards rebuilding them; the lessors had the privilege of terminating the lease and taking back the premises for \$5,000 at any time within three years. The lessees erected buildings upon the premises with the knowledge of, and without objection by the lessors. This action was brought to foreclose a mechanic's lien filed by the plaintiff.

Held, that the lessees were permitted by the owners of the land to build thereon, within the meaning of section 1 of chapter 478 of 1862, and that plaintiff was entitled to enforce his lien against the

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land. (*Burkitt* agt. *Harper*, 14 *Hun*, 581.)

5. Chapter 805 of 1844 providing a mechanic's lien law applicable to all the cities of the state and certain villages, including the village of Canandaigua, was not repealed or affected by the passage of chapter 402 of 1854, as extended by chapter 204 of 1858; and the notice, in order to create a lien on land in Canandaigua, was, after the passage of the acts of 1854 and 1858 still required to be filed in the office of the clerk of the county, as provided in the first act, and not in the office of the town clerk, as prescribed in the two latter statutes. (*Whipple* agt. *Christian*, 15 *Hun*, 821.)

MISJOINDER.

1. In this action, brought by a married woman to recover damages under the civil damage act, the complaint alleged, among other things, that the defendant Crawford resided in one village and the defendant Hoag in another; that, on May 15, 1875, "the said defendants wrongfully, conspiring and intending to injure said plaintiff, at their places of residence aforesaid, gave and sold intoxicating liquors to the said J. M., the plaintiff's said husband * * * which he drank;" and that in consequence thereof, he became intoxicated and killed a horse belonging to plaintiff, to which complaint the defendants separately interposed general denials:

Held, that, even if the allegations as to a conspiracy were rejected as surplage, the complaint charged a joint sale, and that it was not sustained by proof of separate sales by each defendant, at his place of residence. (*Morenus* agt. *Crawford*, 15 *Hun*, 45.)

2. Joinder of maker and guarantor of non-negotiable note as defendants in the same action under Code

of Civil Procedure, section 120. (*See Cawley* agt. *Costello*, 15 *Hun*, 803.)

MISTAKE.

1. *It seems* that a mere inadvertent mistake made by a bankrupt in stating the amount of a debt, will not avoid, as to the creditor, a composition made under, and in pursuance of the act of congress of June, 1874 (sec. 17), amending the bankrupt act. (*Beabe* agt. *Pyle*, 71 *N. Y.*, 20.)

MORTGAGE.

1. Where M. conveyed to F. certain lands, subject to a mortgage, which, by the covenants in the deed, F. agreed to assume and pay, but an agreement was 'made *contemporaneous with the deed*, that M. would take back the land, at any time, should F. become dissatisfied with the purchase, and release F. from the covenants, and F. afterwards reconveyed the land to M., who released him from the covenants in the original deed:

Held, that the release of M. to F. discharged him from all claim to pay the mortgage, and that the holder thereof was not entitled to a judgment against F. for any deficiency arising on a sale, in an action of foreclosure (*See Flagg* agt. *Munger*, 5 *Seld.*, 483; *Crowell* agt. *St. Bernards*, 27 *N. J. E.*, 650; *but, see Whiting* agt. *Gearity*, 14 *Hun*, 498, *note at end of case*). (*Devlin* agt. *Murphy*, *ante*, 836.)

2. Where the consideration expressed in a deed of conveyance of land was the sum of \$15,000, but the deed contained a clause in these words: "subject, however, to the assumption as a part of the consideration," of the conveyance, of a mortgage upon the land:

Held, that the language of the deed amounted to an agreement on the part of the grantee to pay

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the mortgage. (*Douglass* agt. *Cross*, ante, §30.)

3. *Collins* agt. *Rowe* (1 *Abb. N. C.*, 97), distinguished. (*Id.*)

4. Where a husband purchased land, incumbered by a mortgage, and directed that the deed be made out in the name of his wife, he intended to make her a gift of the land; the deed contained a covenant, on the part of the grantee, to pay the mortgage; the wife was, however, ignorant of the transaction, and had no knowledge of the deed or its covenant; it appearing that the husband paid, with his own funds, the consideration on the purchase, and, in like manner, discharged the taxes and assessments:

Held, that the wife, on a foreclosure of the mortgage, was not liable for any deficiency arising on the sale. (*Munson* agt. *Dyett*, ante, 333.)

5. Although a married woman may enter into engagements with respect to her separate estate, there is nothing in the marital relation which authorizes a husband, without his wife's knowledge or assent, to create an estate in lands in her and charge her personally with a covenant in respect thereto. (*Id.*)

6. Where the grantor in a deed is not himself liable to pay a mortgage upon the land, his grantee is not liable to pay the same to the holder thereof, although, by the conveyance to him, he assumes its payment. A promise to pay an incumbrance, of which the holder can take advantage, must be made to one who is liable to pay. (*Id.*)

7. Where B., an attorney, had been requested by the mortgagor to procure him a loan on the property and the papers were executed and acknowledged by M., the mortgagor, and after execution and acknowledgment were sent by K., and by him delivered

to B. for the purpose of obtaining a loan thereon, and B. applied to H., the plaintiff, who consented and gave B. a check for \$5,000, the amount asked for, and received the bond and mortgage from B. and delivered the latter to B. to record, the mortgagor and mortgagee never having seen each other:

Held, that B. was M.'s agent for the purpose of raising money on the bond and mortgage, and the delivery of the same by B. to H. was a good delivery and binding upon M., the defendant, and that the payment of the \$5,000 by H., the plaintiff, to B. was a payment to M., the defendant, through his agent. (*Hemmenway* agt. *Mulock*, ante, 38.)

8. Although the name of the mortgagee was not filled in at the time of the execution of the mortgage, under the peculiar circumstances of the case, the papers must be held to have been delivered to B. by the mortgagor with authority to fill in the name of the mortgagee. (*Id.*)

9. A bond and mortgage executed in blank as to a material part, with *parol* authority to fill up the blank and deliver it, is good. (*Id.*)

10. B., the agent of defendant, drew the money on plaintiff's check for \$5,000 but did not pay it to defendant, claiming some unsettled account between them, and after some months sent \$3,500 back to plaintiff. Plaintiff commenced foreclosure which was settled by the mortgagor signing a paper dated December 9, 1876, acknowledging the payment to B. of the \$1,500 on account of the mortgage, and on this plaintiff paid the mortgagor the \$3,500 balance:

Held, that if one of two innocent persons must suffer pecuniary loss from the dishonesty of B., that the defendant is the person who must sustain the loss.

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Held, further, that the defendant, by the execution of the instrument dated December 9, 1876, is estopped from denying the validity of the bond and mortgage on the ground that the mortgagee's name was not inserted at the time the instrument was executed. (*Id.*)

11. On October 13, 1869, the bank agreed to loan one E. \$7,000. There then existed on the property a first mortgage for \$7,200, on which \$5,700 of the principal was due, made by B. to H., dated November 16, 1864, and duly recorded; also a mortgage made by D. and R. to W., dated March 31, 1868, and recorded, to secure the payment of \$6,700 installments. On closing title the bank paid \$5,827.62 to pay amount due on first mortgage. W., the admitted owner of the second mortgage, executed an agreement postponing it to the mortgage to the bank, which agreement was recorded November 22, 1869, in liber of conveyances. Upon the faith of this agreement the bank's mortgage was taken and duly recorded November 22, 1869. Nothing further was heard of the matter until W. demanded from D. and R., the makers of his mortgage, made subsequent to that of the bank, payment of the same, and threatened foreclosure when D. and R. agreed to buy for the purpose of foreclosing it themselves. They were advised to take the assignment in the name of a third party and induced F., who is a step-brother of R., to purchase it for a consideration of \$1,000, to be paid by two notes. D. and R. knew of W.'s agreement with the bank, though they had never consented to or ratified it, and they assured F. that the mortgage was all right and a first mortgage. Before F. accepted the assignment and gave his notes he retained Wagner, who had been, and then was, the attorney for D. and R., to search the title for him, and in

such search he found the agreement on record as above stated. At about 12 o'clock at noon, on April 23, 1878, at which time the relation of attorney and client existed between F. and Wagner, the latter had an interview with the attorney for the bank, during which the agreement between W. and the bank and certain errors in the recording thereof were discussed. F. took the assignment and parted with the consideration therefor, subsequent to said interview, and put it on record at 3.45 P. M., on that day:

Held, 1. That the agreement between the bank and W., the assignor of F., that W. should waive the priority of his mortgage in favor of a mortgage to be given by E. to the bank, is one not entitled to be recorded under the statute, and, hence, the record thereof is not constructive notice to anybody.

2. That even if it had been thus entitled it should have been recorded in the book of mortgages and not in the book of conveyances in order to make the record effectual, as against subsequent *bona fide* assignees or purchasers, from the mortgagees.

3. That in no aspect of the case can the bank derive any benefit from the mere recording of said written instrument against F., as subsequent assignee of W., whose assignment was duly recorded, provided F. was a purchaser in good faith and for a valuable consideration.

4. That an assignee of a mortgage must take it subject to the equities attending the original transaction, and the true test is to inquire what the mortgagee can do by way of enforcement of it against the property mortgaged. What he can do the assignee can do and no more.

5. That where a mortgage had a valid inception as a subsisting and enforceable lien in the hands of the mortgagee to the full extent of its face, equities arising

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thereafter stand upon a different footing and are to be disposed of upon such other principles of public policy, or, according to such statutory requirements, as the facts of the particular case may call for.

6. That the courts have always been discriminating and careful in cases of conflicting equities arising after the inception and during the life of a mortgage to cast the loss, if any, upon the party at fault. But the protection of the statute extends only to purchasers in good faith and for a valuable consideration. Good faith is not enough without a valuable consideration parted with on the faith of the conveyance; nor is the parting with such valuable consideration sufficient, in the absence of good faith, which cannot be said to exist in case of notice.

7. That though F. may have been personally ignorant of the true state of affairs, the knowledge which his attorney had before the final close of the transaction was, in law, equivalent to notice to him; and he having purchased with notice of the rights of the bank, he cannot be held to have been a purchaser in good faith, though he may have parted with a valuable consideration.

8. That the bank is entitled to a finding setting forth this fact; to an adjudication that it has a lien upon the mortgaged premises for the whole amount of E.'s mortgage, superior to the lien of F., by virtue of his said mortgage and to the usual decree of foreclosure to carry this adjudication into effect.

9. That R. and D., as original mortgagors by the agreement between W. and the bank, it having been made without their knowledge or consent and remaining unsatisfied by them, are discharged from all personal liabilities in the premises. (*Bank for Savings* agt. *Frank*, ante, 408.)

MORTGAGE FORECLOSURE.

1. A creditor at large has no status in a court of equity. (*The People* agt. *Erie Railway Company*, ante, 132.)
2. Where a person seeking to be made a party to an equitable action against a corporation, has not proven his debt by obtaining a judgment, he cannot be regarded as a creditor, and is not entitled to the relief asked for, and neither the insignificance nor the magnitude of his claim can alter the principle governing such cases. (*Id.*)
8. The court will not allow the petitioner to intervene upon affidavits alone, and to stay the sale under a decree of foreclosure, which on its face is regular and legal, and more especially where it appears from the papers that the plaintiff as a co-plaintiff with others, has a suit then pending in which the validity of all the proceedings in the foreclosure suit is questioned. (*Id.*)

See REFERENCE.

Walbridge agt. *James*, ante, 185.

4. Where the judgment ordering the premises to be sold expressly provided that the referee should deduct from and pay out of the purchase-money any lien or liens for taxes or assessments, and only the balance should be paid to the plaintiff:

Held, that this provision is equivalent to an express declaration, by the court to the buyer, that he buys free from all liens for taxes.

Held, also, that although by the terms of sale the purchaser was required to present all claims for taxes, and have the same deducted from his bid, he could, if he saw fit, pay to the referee the entire purchase-money, and rely upon the court to carry out its own judgment as to the application of the moneys thus paid by

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him. (*Poughkeepsie Savings Bank agt. Winn, ante, 368.*)

5. Where the purchaser paid to the referee the entire purchase-money, which was by him paid over to plaintiff, leaving certain taxes unpaid:

Held, that plaintiff should be compelled to pay the same. (*Id.*)

6. December 4, 1848, A. executed a mortgage on certain real estate, which was foreclosed in this action. March 26, 1859, A. conveyed a portion of the property to one Steere, and on December 1, 1865, conveyed the whole thereof to him, subject to the said mortgage, payment of which was assumed by him. On December 1, 1865, Steere executed a mortgage to Lawson and another upon all the premises described in the mortgage of December 4, 1848, except that portion described in the first deed to A. of March 26, 1859. June 5, 1868, Steere executed another mortgage to Averill upon all the lands described in the first-mentioned mortgage of December 4, 1848. August 27, 1874, Steere executed a mortgage to one Childs upon the land conveyed to him by the deed of March 26, 1859. Upon the foreclosure of the first mortgage, given December 4, 1848, *held*, that the land conveyed to Steere March 26, 1859, and subsequently mortgaged to Childs, should be first sold (*Steere agt. Childs, 15 Hun, 511.*)

MOTION AND ORDERS.

1. Petition under chapter 338 of 1858 to vacate an assessment in the city of New York, is a motion and not a special proceeding within the meaning of chapter 270 of 1874 relating to costs; and no costs can be allowed, except costs of a motion and disbursements properly made. (*See Matter of Jetter, 14 Hun, 93.*)

2. The question as to the jurisdiction of the court cannot be tried on a motion. If it appears on the face of the complaint it should be taken advantage of by demurrer; and if it does not so appear it should be set up in the answer. (*See Johnson agt. Adams Tobacco Co., 14 Hun, 89.*)

3. Costs of, not paid—what proceedings stayed. (*See Marsh agt. Woolsey, 14 Hun, 1.*)

4. Notice of—when it must be given. (*See Smith agt. Green, 14 Hun, 529.*)

5. Costs included in judgment—when they cannot be stricken out on motion. (*See McLean agt. Stewart, 14 Hun, 473.*)

6. A statement for judgment by confession authorized judgment for the amount of two items, as to one of the items, was claimed to be insufficient. The sufficiency of the statement, as to the other item, was not questioned; judgment was perfected upon the statement, and upon execution issued thereon, personal property was levied upon and sold more than sufficient to pay and satisfy that item. Subsequently real estate of the judgment-debtor was sold. A motion on behalf of another judgment creditor, whose judgment was perfected after sale of the personal property to set aside the sale of the real estate was granted:

Held, error; that conceding that the statement was defective as to the contested item, the judgment was valid between the parties; that, in the absence of any special arrangement, the law applied the sum realized upon the sale of the personal property, generally upon the judgment; and that the debt being *bona fide*, there was no equity in favor of subsequent judgment creditors to have said sum applied to extinguish the item, as to which the statement was sufficient, in order to make the sale of the real

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- estate void. (*Harrison* agt. *Gibbons*, 71 N. Y., 58.)
7. A special term order appointing a person to act as surrogate, and directing a commission to issue to him in the matter of the probate of a will, in a case where a surrogate, county judge and district attorney are disqualified from acting is valid. (*In re Hathaway*, 71 N. Y., 238.)
 8. An order of general term vacating an order requiring a party to show cause upon short notice, why he should not be punished for contempt, in violating an injunction awarded by final judgment, is not appealable to this court. (*Sixth Ave. R. R. Co.*, agt. *Gil. El. R. R. Co.*, 71 N. Y., 430.)
 9. To proceed upon an order at short notice, instead of upon a notice for the usual and regular term, is not an absolute right. It is in the discretion of the judge at chambers to grant the order to show cause, and within the discretion of the general term to vacate it and remit the moving party to the usual course of proceeding, and their action in this respect is not reviewable here. (*Id.*)
 10. *It seems* that, where the court below refuses to hear and denies the application on the ground of a want of power, and not in the exercise of a judicial discretion the decision is appealable. (*Id.*)
 11. When an appeal to this court has been dismissed for failure to serve papers and the *remittitur* has been sent down, judgment entered thereon and executions issued, a motion will not be entertained to reinstate the appeal. (*Jones* agt. *Anderson*, 71 N. Y., 599.)
 12. *It seems* that in such case the appellant should move in the supreme court to have the proceedings there vacated, and the *remittitur*, returned here to the end that he may then make his motion for relief. (*Id.*)
 13. An order of the county court, under the drainage act (*chap. 888, Laws of 1869 as amended by chap. 803, Laws of 1871*), auditing and confirming the accounts of commissioners appointed under said act, is appealable to the general term of the supreme court upon questions of law. (*In re Ryers*, 72 N. Y., 1.)
 14. The provision of said act (*sec. 12*), making the decision of the county court final, only applies to and makes the order final upon matters of fact. (*Id.*)
 15. Such an order is a final order in a special proceeding, affecting a substantial right, and so is reviewable here. (*Id.*)
 16. To authorize an appeal to this court in a case where the judgment is less than \$500, there must be an order of general term, as prescribed by the act of 1874 (*chap. 822, Laws of 1874*), stating that the case involves some question of law which ought to be reviewed here. An order simply giving leave to appeal, without assigning any cause for so doing, is insufficient. (*Bastable* agt. *The City of Syracuse*, 72 N. Y., 64.)
 17. Upon an attachment issued in this action, the sheriff seized certain property; by consent of the parties interested an order was obtained providing that the sheriff should proceed to sell by an auctioneer named, "and hold the proceeds thereof in the same manner as the property sold, subject to the existing rights of all parties therein." In pursuance of the order the sheriff sold and rendered his account, which was settled save as to items charged for auctioneer's fees, which were objected to as excessive:

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Held, that an order was proper taxing the items and requiring the sheriff to pay over the difference between the amount so allowed on taxation and that retained, although the money did not actually come into his hands; that it was to be presumed that he assented to the order naming the auctioneer, as neither the court nor the parties could compel him to employ an auctioneer, or could name one whom he should employ without his consent; that the auctioneer was his agent, and for moneys coming into the hands of such agent he was responsible; and that this was a proper case for taxation under the provision of the statute on that subject (2 R. S., 652, sec. 1). (*Griffin agt. Helmbold*, 72 N. Y., 487.)

18. Also, *held*, that it was not error for the general term, on appeal from an order of special term denying a motion so to charge the sheriff to make such an order as should have been made by the special term. (*Id.*)

19. A purchaser under defective proceedings to sell real-estate of a lunatic may move to have title perfected, or to have purchase-money refunded. (*See In re Valantine*, 72 N. Y., 184.)

NATURALIZATION.

1. The superior court of the city of New York has power and jurisdiction to entertain and grant an application, to have a record of the proceedings in such court, admitting the applicants to citizenship of the United States, perfected by an entry *nunc pro tunc* of the fact of such admission in the minute book of the court, provided a proper case has been made out for its exercise. (*Matter of Christern*, ante 5.)

2. As a general rule the court will not permit a party to suffer through

any delay or mistake of its own, nor by the delay or mistake of its officers. (*Id.*)

3. It is only when the rights of third persons which have in the meantime been acquired in good faith intervene, that relief will not be given; but even such third persons cannot rely upon a mere technical error which leaves no doubt about what was intended. (*Id.*)

4. In the admission of aliens to citizenship, the only record required to be kept by the court, where the application is made, and the certificate of citizenship issued, is a record showing the declaration of intention, the oath to support the Constitution of the United States, and the renunciation of the foreign jurisdiction and title or order of nobility. (*Id.*)

5. No provision is made as to how the judge presiding over the court should proceed to satisfy himself of the fulfillment of the conditions prescribed, and no provision is made for the preservation of the oral proofs to be given or the attestation of the adjudication to be made, or for the entry of the fact of such adjudication in any book. In the absence of statutory regulations upon the subject, the extent and manner of keeping the record of court proceedings, is left very much to the sound discretion of the court. (*Id.*)

6. Where it is shown by the applicant, that on full preliminary requirements of the statutes of the United States, he duly applied in open court to be admitted a citizen of the United States; that he took the requisite oaths, and supported his application by the necessary and to the court satisfactory proof; that the court gave judgment to admit to citizenship, and that the officiating judge signified his "flat" to that effect to the clerk of the court, to the applicant and

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to all whom it might concern, by superscribing the initials of his name upon the written and oath attested proofs in the case, and delivered the same to the clerk to do thereupon and therewith all that the law required; that the clerk then and there, in pursuance of such judgment and fiat duly administered, and the applicant duly took and subscribed, the oath commonly called the oath of allegiance; and that thereupon the clerk issued to the applicant, under the seal of the court, a certificate as evidence of the fact of the adjudication made; that the clerk then indorsed and filed the papers and fiat among the court records, as a part thereof, and entered the name of the applicant and other facts connected with the application in a book of index of naturalization records, which is one of several books of like character regularly kept and permanently preserved among the records of said clerk's office:

Held, that, the clerk, in the performance of the duties assigned to him in these proceedings, was guilty of no omission, which rendered the record, as made up by him, invalid. (*Id.*)

7. When the presiding judge, on giving judgment admitting the applicant to citizenship, attested the fact thereof by affixing his initials to the preliminary proofs, and delivered the papers so attested to the clerk with the direction, express or implied, to do all that remained to be done, the judicial function was completed, and only ministerial acts remained to be done; and the papers so handed over, together with the oath of allegiance thereupon administered, became the judgment record of the court on being filed as such by the clerk and by reason of such filing. The record thus made up constituted a sufficient memorial or remembrance within the requirements of the common law. (*Id.*)

8. If it be deemed of importance that an entry should be made in some book, the entries contained in the books marked "Naturalization Index" and "Naturalization Record" fully answer every requirement that can be made in that respect. (*Id.*)

NEGLIGENCE.

1. The ferryboat of plaintiffs while on one of her regular trips across the Hudson river encountered a quantity of floating ice and was carried and lodged against the bridge of the defendant. Whilst the boat was resting against the bridge the defendant, by its servants, undertook to remove the same, and in doing so pulled the boat under the bridge, causing a part of that structure to fall upon the boat, doing her great injury. The boat was sunk and swept by the current to the lower part of the city, where she remained sunken for several weeks, and was finally raised by plaintiffs. In an action for damages, *held*, that, if the defendant's servants undertook to remove and did remove the boat at the request or by the permission of the plaintiffs, there could be no recovery, because the men became for that act the servants of the plaintiffs. If, however, there was no such request or permission, the defendant was answerable for any *wild, reckless or intended misconduct* of its servants. (*Mark agt. Hudson River Bridge Company, ante, 108.*)
2. The boat being there without any fault of the defendant, resting upon and against its property, it was the duty of the plaintiffs to remove her from that position, using all reasonable expedition and haste consistent with the circumstances of the occasion. (*Id.*)
3. If the plaintiffs failed in the discharge of this duty, then defendant had a right to do it. But in

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so doing, it was bound to use ordinary care, such care as an ordinary prudent man would exercise in the management of his own property. The defendant is not to be held liable for mere errors of judgment upon the part of its servants, but only for such acts, or such negligence, as the ordinarily prudent man would not have committed in regard to his own property. (*Id.*)

4. Although the defendant was not insurers of the plaintiffs against all damage which might be caused in removing the boat, it may be made liable where the conduct of its servants was needless, reckless or useless, and which an ordinarily prudent man would not have been guilty of under the same circumstances. (*Id.*)

5. Assuming that the boat was in collision and contact with the bridge by the fault of the plaintiffs, the act of the plaintiffs which put her there, or the neglect to remove her therefrom, is not to be deemed contributory negligence on their part, and therefore one which will defeat a recovery. (*Id.*)

6. The act and conduct of the plaintiffs did not contribute to the injury in any way. The force which did the injury was an entirely independent one and intended to be applied. A wrong committed by the plaintiffs upon the defendant could not justify a second and independent one by the latter to the former. The injury done by the latter is the result entirely of a separate act of its own, and in the doing of which the plaintiffs were in no wise contributors. (*Id.*)

7. Where, therefore, though all the consequences may not have been intended if what was done, was *wild* and *reckless*, and *intended*, and such as no ordinarily prudent man would have committed, the defendant must be accountable

therefor, because the acts are entirely its own, and to them the plaintiffs do not contribute.

Held, further, that though the conduct of the defendant was negligent and reckless, still what it did was done to remove the property of the plaintiffs, which was injuring that of defendant, and which the plaintiffs should have taken away, and not to convert it to its own use. The removal of the boat having been accomplished, it was the duty of the plaintiffs to have taken possession of the boat as she was; and they had no right to abandon her. The plaintiffs could only recover for the injury and damage done to the boat by her removal and the fall of the bridge upon her. For all injuries which occurred after the plaintiffs could have relieved her there can be no recovery. (*Id.*)

8. It is no error after a jury has come into court and delivered their verdict (the form of which showed they intended to add interest thereto) for the court to send them back to their room to calculate the interest. (*Id.*)

NEW TRIAL

1. Where a party moved at the circuit for a new trial on the minutes and on the ground of "surprise:"

Held, that under section 1002 of the Code of Civil Procedure the motion could not be heard at the circuit, in so far as "surprise" was urged as a ground, but should be brought on at special term. (*Argall* agt. *Jacobs et al.*, ante, 187.)

2. Section 999 discloses the grounds upon which a new trial may be granted at the circuit. (*Id.*)

3. *Libby* agt. *Strasburger* (14 Hun, 120) applied in a case where fraud was charged in contracting

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a debt claimed to be discharged in bankruptcy. (*Id.*)

4. Where, in an equity case, specific questions of fact have been submitted to the jury, under the direction of the court, and no motion for a new trial has been made upon the judge's minutes, or at special term upon a case and exceptions, a party appealing from the judgment will be deemed to have acquiesced in the verdict, and the questions of fact involved therein cannot be reviewed on appeal (*Ward* agt. *Warren*, 15 *Hun*, 600).

NEW YORK CITY.

See PUBLIC ADMINISTRATOR.

Douglass agt. *The Mayor*, ante, 178.

NON-JOINDER.

1. In this action one of the defendants, a bank, demurred on the ground that its receiver should have been made a party to the action; two of the defendants answer jointly, and all the others separately, none of them setting up by demurrer the non-joinder of the receiver, which defect of non-joinder appeared upon the face of the complaint. The demurrer was overruled on the ground that the corporation had no interest in the joinder, but it appearing that, in this respect, there was a defect of parties, the plaintiff was allowed to join the receiver as a party, but was required to pay costs up to that time to all the defendants who had answered. The bringing in of the receiver did not change any of the issues in the action:

Held, that it was error to compel the plaintiff to pay costs to the defendants who had failed to demur (*Hand* agt. *Burrows*, 15 *Hun*, 481).

2. *Held*, further, that the order requiring him so to do was appealable. (*Id.*)

NON-RESIDENTS.

See DISTRICT COURTS.

Clarkson agt. *Müllnacht*, ante, 328.

NOTICE.

1. When it is sought to charge a corporation with notice to, or with acts or omissions of, its agents, it must appear that the notice was communicated to, or that the act or omission proceeded from, a person in the employment of the corporation charged with some duty in the premises. (*Mutual Life Insurance Company* agt. *Davis*, ante, 440.)

NOTICE TO QUIT.

1. Where it is stipulated that the tenant shall quit on ten days' notice, such notice must be precise and definite as to the time when the surrender is required to be made. A notice requiring the tenant to surrender possession "as soon as practicable" is insufficient (*People ex rel. Sanford* agt. *Gedney*, 15 *Hun*, 475).

OFFER.

1. An offer to allow the plaintiff to take judgment for an amount therein specified, signed by the defendants' attorney, but to which the affidavit required by section 740 of the Code of Civil Procedure is not annexed, is a nullity and the plaintiff is not required either to accept or reject it. (*Riggs* agt. *Waydell*, ante, 247.)
2. There is no such thing as creating an offer by waiver. A plaintiff cannot waive it into validity as against a defendant. (*Id.*)

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3. If a party desires the benefit of the statute he is bound to do just what the statute points out. (*Id.*)

4. In justice's court — acceptance of — what sufficient — Code of Procedure, section 64, subdivision 5. (*See Beecher agt. Kendall, 14 Hun, 827.*)

5. To allow judgment to be taken — neglect to annex affidavit — Code of Civil Procedure, section 744. (*See McFarrren agt. St. John, 14 Hun, 887.*)

6. To pay for a certain location of a railroad line — void — acceptance of, necessary. (*See Dix agt. Shaver, 14 Hun, 892.*)

ORDERS.

1. Upon an appeal from an order denying a motion for a new trial made upon the minutes of the justice trying the action, it is not necessary that the particular grounds assigned in support of the motion should be specifically mentioned; it is sufficient if it appear from the order that the motion was actually heard and decided. (*Covles agt. Watson, 14 Hun, 41.*)

2. For publication of summons — requisites of — Code of Civil Procedure, section 440. (*See McCool agt. Boller, 14 Hun, 78.*)

3. Of arrest — may be granted in an action for injury to real property — Code of Civil Procedure, section 549, subdivision 2. (*See Welch agt. Winterburn, 14 Hun, 518.*)

4. Denying motion to require plaintiff to separately number causes of action and to strike allegations therefrom — when appealable. (*See Sprague agt. Duntion, 14 Hun, 490.*)

5. Denying a motion to change the place of trial — is appealable to

the general term. (*See McDonald agt. McDonald, 14 Hun, 496.*)

PARTITION.

1. In an action for the partition of lands where the complaint failed to state in explicit terms that the plaintiffs, who claimed title to the land as the heirs at law of a decedent in possession, were themselves in possession of their shares, or held the premises as joint tenants or as tenants in common with others:

Held, upon demurrer, that the complaint was insufficient (*Stewart et al. agt. Munroe et al., ante, 198.*)

2. A complaint in an action for partition should conform, in its statements, to what was required to be set forth in a petition for partition under the Revised Statutes (1 R. S., p. 318, sec. 5). (*Id.*)

3. The statutes require that the "rights and titles" of the plaintiff should be set forth. (*Id.*)

4. Rights and titles under the statute considered. (*Id.*)

5. Where one seeks to avail himself of a remedial statute he should, in pleading, bring himself within its terms by clear, distinct, affirmative allegations. (*Id.*)

6. Where the legatees have elected to take the land the executor, who was directed by the will to sell the same, is not a necessary party to an action brought to partition it. (*Prentice agt. Janssen, 14 Hun, 548.*)

PARTIES.

1. A creditor at large has no status in a court of equity. (*The People agt. Erie Railway Company, ante, 122.*)

2. Where a person seeking to be

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- made a party to an equitable action against a corporation, has not proven his debt by obtaining a judgment, he cannot be regarded as a creditor, and is not entitled to the relief asked for, and neither the insignificance nor the magnitude of his claim can alter the principle governing such cases. (*Id.*)
3. The court will not allow the partitioner to intervene upon affidavits alone, and to stay the sale under a decree of foreclosure, which on its face is regular and legal, and more especially where it appears from the papers that the plaintiff as a co-plaintiff with others, has a suit then pending in which the validity of all the proceedings in the foreclosure suit is questioned. (*Id.*)
4. A stockholder of a corporation may maintain an action in his own name, and in the behalf of all others similarly situated, to recover of a trustee property of the corporation which the trustee has converted to his own use, the corporation being made a party defendant. (*Carpenter agt. Roberts, ante, 216.*)
5. The complaint in this action alleged that the defendant was indebted in different sums to the various firms, plaintiffs herein, which he had agreed to pay as soon as he should be able to do so; that he had paid \$10,000 on account of such indebtedness, but refused to pay the balance on the ground that he had been released by the plaintiffs; that the plaintiffs were induced by fraudulent concealment and representations on the part of the defendant to execute and deliver to him a joint release. They seek in this action to set aside such release and pray for separate judgments in their favor for the balance of their respective claims:
Held, that the complaint was not objectionable as improperly uniting several causes of action. (*Smith agt. Schulting, 14 Hun, 52.*)
6. That as the plaintiffs were induced, by a common fraud practiced upon them, to execute a joint release they were entitled to maintain a joint action to set the same aside. (*Id.*)
7. That the fact that they prayed for separate judgments for the respective amounts due to them, did not render the complaint multifarious. (*Id.*)
8. This action was brought to recover damages for injuries to plaintiff's business, occasioned by certain libelous publications, alleged to have been made by defendants as advertising agents for some persons unknown. The plaintiff procured an order for the examination of the defendants, under section 391 of the Code, to enable them to frame a complaint and to ascertain the names of the persons who prepared and procured to be published the said advertisements, in order that they might be made parties to the action:
Held, that under section 391 an examination could not be ordered in a case in which the party might refuse to answer the questions to be put, on the ground that they would tend to criminate himself, and that the order should be reversed. (*Brandon Mfg. Co. agt. Bridgman, 14 Hun, 122.*)
9. Upon an application to examine a party under sections 870, &c., of the Code of Civil Procedure, the affidavits must conform to the requirements of the sections and an order made on argumentative affidavits will not be sustained.
 Upon an application by the defendant to examine the plaintiff, in an action brought by the latter to recover damages for an injury sustained in consequence of a defective pavement, the affidavit stated that the facts and circumstances connected with the hap-

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pening of the alleged accident, and the hour of the day or night on which it is stated to have occurred, and the names of the by-standers or witnesses, if any there were, and the nature and extent of plaintiff's injuries, were not within the defendant's knowledge, and in order to enable defendant to prepare properly for the defense of the action it would be necessary to examine the plaintiff before trial:

Held, that this statement of facts was not sufficient, or such as was required by the statute; that it did not show that the testimony was material and necessary for the party making the application for the prosecution or defense of the action. (*Beach agt. Mayor*, 14 *Hun*, 79.)

10. The provision of section 886 of the Code of Civil Procedure directing that a party to be examined as a witness before trial shall not, if a resident of this state, be required to attend in any county other than that in which he resides or where he has an office for the regular transaction of business in person, is peremptory and will be enforced by the courts. (*Marsh agt. Woolsey*, 14 *Hun*, 1.)

11. A firm, composed of the defendant and the plaintiff, borrowed of the plaintiff, as executor and trustee of the estate of one Guion, \$30,000. Subsequently the firm was dissolved, defendant, in pursuance of an agreement, taking all the assets and agreeing to pay all the debts, including that due to the said estate. In an action against defendant by the plaintiff, as executor and trustee, as aforesaid, to recover the same, *held*, that the promise of the defendant inured to the benefit of the estate of Guion, and that it could be enforced by the plaintiff:

Held, further, that it was not necessary to make the plaintiff, individually, a party defendant. (*Meloin agt. Tomes*, 14 *Hun*, 81.)

12. In this action one of the defendants, a bank, demurred on the ground that its receiver should have been made a party to the action; two of the defendants answer jointly, and all the others separately, none of them setting up by demurrer the non-joinder of the receiver, which defect of non-joinder appeared upon the face of the complaint. The demurrer was overruled on the ground that the corporation had no interest in the joinder, but it appearing that, in this respect, there was a defect of parties, the plaintiff was allowed to join the receiver as a party, but was required to pay costs up to that time to all the defendants who had answered. The bringing in the receiver did not change any of the issues in the action:

Held, that it was error to compel the plaintiff to pay costs to the defendants who had failed to demur (*Hand agt. Burrows*, 15 *Hun*, 481).

13. *Held*, further, that the order requiring him so to do was appealable. (*Id.*)

14. Where a policy of life insurance is made payable to the executors or administrators of the insured, in trust for his father, the executor is the trustee of an express trust, and may maintain an action to recover the amount of the policy (*Grattan agt. National Life Ins. Co.*, 15 *Hun*, 74).

15. *It seems*, that if an assignee in bankruptcy refuse, or neglect to sue for, or reclaim property fraudulently transferred by the bankrupt, the creditors may commence an action to reach the property, making the assignee the debtors, and his transferees parties defendant; and in such action the property will be administered directly for the creditors. (*Dewey agt. Moyer*, 72 *N. Y.*, 70.)

16. *It seems*, also, that when the as-

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signee has been discharged, or where the plaintiffs in such action represent all the debts which the bankrupt owed at the time the assignee was appointed, his absence, as a party, will be disregarded. (*Id.*)

17. So, also, when the assignee has lost the right to sue by not bringing an action within two years, as limited by the bankrupt law (*sec. 2*), the creditors may bring an action in their own names. (*Id.*)

18. Where, upon a criminal trial, the prisoner offers himself as a witness in his own behalf, he is subject to the same rules upon cross-examination as any other witness; he may be asked questions disclosing his past life and conduct, and thus impairing his credit, although tending to show he has before been guilty of the same crime for which he is upon trial. (*People* agt. *Casey*, 72 N. Y., 393.)

19. The extent to which such an examination may go to test the witnesses' credibility is largely in the discretion of the trial court. (*Id.*)

20. Although a person on trial for a criminal offense by taking the stand as a witness may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party; his counsel may speak for him while he is a witness, and an error committed by the court against him may inure to his benefit as a party. (*People* agt. *Brown*, 72 N. Y., 571.)

21. An action cannot be maintained by the supervisor of a town in his name of office against his predecessor, for omitting in his last accounting to render an account of town moneys and securities in his hands, and converting the same to his own use. For these causes an action is expressly given by the statute to the town in its corporate capacity (1 R. S., 349,

sec. 5, as amended by chap. 534 Laws of 1866), and must be brought in that name. (*Hagadorn* agt. *Roux*, 72 N. Y., 583.)

22. Although the language of the statute is in form permissive, yet its being for the protection of the public interests, the word "may" therein is the equivalent of "must," and the statute is mandatory upon the town auditors to bring an action in the name of the town. (*Id.*)

23. Although a party is not incompetent under section 399 of the old Code to testify to an independent conversation between the deceased and a third person, yet if he participated in the conversation and it related to a transaction between him and the deceased, he is incompetent. (*Kraushaar* agt. *Meyer*, 72 N. Y., 602.)

24. Accordingly, *held*, where in the course of a business transaction between plaintiff's testator and defendant M. the deceased made certain statements to V., who was engaged in drawing up papers between the parties in regard to such transaction, and which statements were in reference to it, that M. was incompetent to testify thereto. (*Id.*)

PARTNERS.

1. This action was brought to recover the price of certain lumber sold to the defendants, who were partners, and for work performed for them. An affidavit, used to procure an order of arrest, alleged that one of the defendants had falsely represented that their firm was fully responsible, when, in fact, it was insolvent; that shortly before these representations were made each of the partners conveyed certain lands, of the value of \$6,000, to their wives without consideration; that the deeds were not recorded until four months after the making of the represent-

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ations, and that the conveyances were made to cheat the creditors of the defendants; that the concealment thereof was to cheat and defraud the plaintiffs, and that each partner ordered some of the items of the bill, knowing at the time that they were insolvent:

Held, that the affidavit showed facts, independent of the false representations, sufficient to sustain an order of arrest against both partners. (*Hitchcock agt. Peterson*, 14 Hun, 389.)

2. It is not necessary that the affidavits should specify the grounds of the arrest in terms; it is enough that they state facts sufficient to authorize the conclusion that the grounds exist. (*Id.*)

3. *Semble*, that the action being on contract, and not for the wrong, the partner not making the false representation was not liable to arrest for the false representation made by his co-partner, without his knowledge, authority or ratification. (*Id.*)

PAWNBROKERS.

1. A pawnbroker is liable only for ordinary diligence, and where his place of business is broken into and articles pledged are taken therefrom he is not liable, if he exercised ordinary diligence. (*Abbott agt. Frederick*, ante, 68.)

PAYMENT.

See AGENTS.

Bisby agt. Drexel, ante, 478.

PLANK-ROADS.

See COMMISSIONERS OF HIGHWAYS.

The People ex rel. Penn Yan and Branchport Plank-road Co. agt. Martin, ante, 516.

PLAY.

1. A state court has jurisdiction of an action to determine the rights of the respective parties under an agreement by defendant with plaintiff, for the exclusive right to have and perform a certain play. (*Widmer agt. Greene*, ante, 91.)

2. Where, by an agreement dated February 7, 1878, the defendants in consideration of the covenants therein contained, conveyed and transferred to the plaintiff the sole right for America, to have and perform the play written by them, entitled *M'liss*; it was further agreed that unless the play was performed at least fifty times within one year from the date of the agreement, and forty times in each succeeding year, all the rights of plaintiff should cease and determine at the option of defendants, and that plaintiff at any time within one year on the tender of \$5,000, should be entitled to an absolute conveyance of the right and title of said play from defendants, and that no change should be made in the contract, except in writing signed by the parties:

Held, that this agreement vested the plaintiff (until she had failed to keep some of the covenants on her part) with the sole right to "have and perform" the play in question in America.

Held, further, that plaintiff was entitled to an injunction restraining McDonough, to whom (without plaintiff's consent) defendants claim to have transferred the right to produce said play in America, from producing the same. (*Id.*)

3. Plaintiff by the agreement succeeded to all the rights which the defendants had to produce the play in question in America, and the defendants parted with all right to authorize any other person to produce such play in America, as long as the plaintiff

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kept her agreement with them. (*Id.*)

4. As the assignee or vendee of the defendants the plaintiff is entitled to the aid of this court as against those who seek to perform such play without her consent. (*Id.*)

5. The rule that where there is a dispute as to the construction of an agreement between the parties, the court will not grant an injunction until the effect of the agreement has been established at law, does not apply to this case. (*Id.*)

PLEADINGS.

1. Where the complaint sets forth a note payable on demand, *with interest*, it is competent for the defendant, under an answer containing a mere *general denial*, to show that the note had been altered since its execution by adding the words "with interest." This alteration, insufficiently explained, vitiated the note. (*Schwartz et al. agt. Oppold et al., ante, 156.*)

2. Objections to proof must be specifically made at the trial in all cases where they might then have been obviated by an amendment of the pleadings, and it is too late to object to the verification of the pleading upon the trial. (*Id.*)

3. The conflict in the law as laid down in *Boomer agt. Koon*, as reported in 6 *Thompson & Cook, Supreme Court Reports, 645*, and in 6 *Hun, 645*, settled. (*Id.*)

4. Where one of several defendants served with the complaint demurred thereto and the demurrer was noticed for argument, and nearly three months thereafter another defendant was served with the complaint:

Held, that the plaintiff could not amend the complaint, as of course, as to the defendant who

had demurred, although the amendment was claimed within twenty days of the time the last complaint was served. (*George agt. Grant, ante, 244.*)

5. Section 542 of the Code of Civil Procedure applied, (*Id.*)

6. A separate trial between the plaintiff and one or more defendants may be directed by the court in its discretion. But where there are demurrers interposed by several defendants they should be brought on for trial at the same term (*Code of Civil Procedure, sec. 967.*) (*Id.*)

7. The complaint in this action alleged that the defendant was indebted in different sums to the various firms, plaintiffs herein, which he had agreed to pay as soon as he should be able to do so; that he had paid \$10,000 on account of such indebtedness, but refused to pay the balance, on the ground that he had been released by the plaintiffs; that the plaintiffs were induced by fraudulent concealment and representations on the part of the defendant to execute and deliver to him a joint release. They seek in this action to set aside such release, and pray for separate judgments in their favor for the balance of their respective claims.

Held, that the complaint was not objectionable as improperly uniting several causes of action. (*Smith agt. Schulting, 14 Hun, 52.*)

8. That as the plaintiffs were induced by a common fraud practiced upon them to execute a joint release, they were entitled to maintain a joint action to set the same aside. (*Id.*)

9. That the fact that they prayed for separate judgments for the respective amounts due to them, did not render the complaint multifarious. (*Id.*)

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10. Under section 558 of the Code of Civil Procedure, relating to the issuing of orders of arrest, and providing that, "at any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint shows that the cause is not one of those mentioned in sections 549 or 550 of this act," it is not necessary to state in the complaint the facts relied upon to justify the arrest; it is sufficient if they be shown by affidavits. (*Sloane* agt. *Livermore*, 14 Hun, 29; *See, also, Taylor* agt. *Faas*, 14 Hun, 166.)
11. Where an answer attempts to set up the defense of usury, it is not necessary that a formal agreement either verbal or written, should be set forth in so many words; it is sufficient if a usurious agreement be in substance averred. It is enough to allege the facts as they occurred, and if such facts justify the inference of a usurious contract, the answer, no demurrer having been interposed thereto, ought to be held sufficient. (*Maule* agt. *Gravford*, 14 Hun, 198.)
12. Usury—how it must be pleaded. (*See Archer* agt. *Shea*, 14 Hun, 494.)
13. Want of jurisdiction—when it can be taken advantage of by demurrer—when by answer. (*See Johnson* agt. *Adams Tobacco Company*, 14 Hun, 89.)
14. Verification of answer—where defendants, severally interested, answer together to a verified complaint served on some and an unverified complaint on another—necessary, as regards those on whom verified complaint is served. (*See Wendt* agt. *Peyser*, 14 Hun, 114.)
15. General denial—joint stock association—when its existence must be proved under a general denial—not by parol evidence. (*See Saltzman* agt. *Shulte*, 14 Hun, 256.)
16. Action against joint debtors—death of one of them—supplemental complaint omitting him proper. (*See Angell* agt. *Lawton*, 14 Hun, 70.)
17. Amendment to complaint—power of court to allow—Code of Civil Procedure, section 728. (*See Bailey* agt. *Lee*, 14 Hun, 524.)
18. Where the payee of a non-negotiable note seeks to charge one who has indorsed the same prior to its delivery to him, he must allege in the complaint that such person indorsed the note with intent to become liable thereon, either as maker or guarantor (*Cawley* agt. *Costello*, 15 Hun, 302).
19. *Quare*, whether the maker and guarantor could be joined as defendants in the same action, under section 120 of the Code of Civil Procedure. (*Id.*)
20. Where a complaint, in an action to vacate an assessment as a cloud upon title, alleges two grounds upon which relief is claimed, one of which is good and sufficient, the complaint is not demurrable because of the insufficiency of the other; the allegations as to the latter will not vitiate or detract from the effect of the allegations as to the former. (*Boyle* agt. *City of Brooklyn* 71 N. Y., 1.)
21. In an action to set aside an assessment upon plaintiff's premises for repaving Atlantic avenue, in the city of Brooklyn, the complaint alleged, in substance, that the proceedings under and in pursuance of which the assessment was imposed appeared, upon their face, regular and in accordance with the statute, and the assessment appeared to be a valid and subsisting lien upon plaintiff's premises, but that the petition upon which the proceedings were based was not in fact signed by a majority of the owners of the land fronting on said avenue, as re-

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quired by the statutes under which said proceedings were instituted (*chap. 652, Laws of 1870; chap. 887, Laws of 1874*); that said petition was fraudulently made up, and had appended thereto a large number of names of persons who did not sign the same, but whose signatures were taken from another petition; also, that the whole of the southerly part of said avenue was owned by individuals, and had never been taken for a public highway, and the persons who signed as owners fronting on said avenue on the south were not owners on the avenue, and that, without such signatures, a majority of the owners did not have their names appended to the petition:

Held, that the allegations of the complaint were sufficient to entitle plaintiff to the relief sought and that a demurrer thereto was properly overruled; that the fact alleged as to a fraudulent addition of names to the petition would not necessarily appear in the proofs of a party claiming under the assessment, but in defending against such claim plaintiff would be obliged to produce evidence establishing it, and that this was sufficient to sustain the complaint although the invalidity of the assessment arising from the other fact alleged — *i. e.*, that a portion of the signers were not owners — would necessarily appear in proceedings to enforce the lien of the assessment; also that the alleged want of title in the signers would not necessarily appear; that it would only be necessary for one claiming under the assessment to prove that the petition was signed by a majority of the owners of the lands fronting on the avenue as it was actually opened paved and used, not that the land included in it had been legally taken; and if not so taken, it would be incumbent upon plaintiff to prove it. (*Id.*)

22. Also, *held*, that the allegations in

the complaint as to ownership of a portion of the avenue in third persons, and that it never had been legally taken, were sufficient, but if insufficient, then that the complaint disclosed no defect, except the latent one arising from the fraudulent addition of names to the petition, and so there was no ground for demurrer. (*Id.*)

23. In an action to recover possession of personal property, alleged in the complaint to belong to plaintiff, and to be in the possession of and wrongfully detained by defendant, the answer contained a general denial; and also, alleged that the property was owned by plaintiff, and by her pledged as security for a debt to defendant's wife, and that it was in the possession of the latter as such pledgee:

Held, that under the pleadings defendant was not entitled to give evidence of the pledge to his wife; that in the absence of any allegation connecting defendant with the title, possession or interest of his wife, the special matter set up in the answer constituted no defense, as plaintiff's right to the property under the alleged pledge remained perfect against all the world save the pledgee; and that defendant had no standing under his answer to try the question of right between the pledgor and pledgee. (*Stowell* *agt. Otis*, 71 *N. Y.*, 86.)

24. A complaint in an action upon an undertaking on appeal given in pursuance of section 348 of the old Code, which fails to allege "service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from," ten days before the commencement of the action, is defective; the notice is a condition precedent to the commencement of the action, and in the absence of the allegation the complaint does not state a cause of

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action. (*Porter* agt. *Kingsbury*, 71 N. Y., 488.)

25. In an action for slander, circumstances in mitigation must be set up in the answer in order to make evidence thereof admissible. (*Wilover* agt. *Hill*, 72 N. Y., 36.)

26. In an action for slander—for words alleged to have been spoken by defendant M.—the slanderous words were proved by S. to have been spoken in a certain conversation, which said witness testified was the first occasion when the plaintiff was the subject of conversation between her and M. M., as a witness in her own behalf, after being examined as to the alleged conversation, and as to subsequent conversations with S., was asked if S., at any of these conversations, brought reports to her as to what people had said about plaintiff and M.'s husband. This was objected to and excluded:

Held, no error; that the evidence could be only available, if at all, in mitigation of damages, by showing provocation, and that M. was merely repeating a slander she had heard; that it could only be thus available by showing that these reports were brought to M. before she uttered the words charged, and the question should have been confined to a period preceding the slander; also, that it was incompetent because not set up in the answer. (*Id.*)

27. The slanderous words charged illicit intercourse between plaintiff and defendant H., M.'s husband, while the former was in the employ of the latter as a servant. No justification was pleaded. Defendants offered to prove that, after plaintiff left their employ, and after she was aware that reports of such intimacy were in circulation, she was seen in the store of H. alone with him at 10 P. M.; also, that prior to the uttering of the alleged slander, these

reports were in circulation; this was rejected.

Held, no error; that the evidence was not competent in mitigation, as no offer was made to show that the fact of the meeting at the store was communicated to M. before she uttered the alleged slander; and, that it was incompetent either in justification or mitigation not having been pleaded. (*Id.*)

28. An allegation in a complaint, in an action to recover the rents and profits of land, that plaintiff is entitled to the possession of the land and to the rents and profits thereof, is a mere allegation of a conclusion of law, and is insufficient; the facts should be alleged, from which such a conclusion may be drawn. (*Sheridan* agt. *Jackson*, 72 N. Y., 170.)

29. Plaintiff's complaint alleged, in substance that he was entitled to the rents and profits of certain premises; that in an action between the other defendants, who claimed as between each other, some interest in the premises, defendant C. was appointed receiver of the rents and profits, and a large amount thereof came into his hands, which plaintiff had demanded but C. refused to pay over. Plaintiff demanded that C. account; that he be restrained from paying over the moneys so received by him to any other person and that he be required to pay the same into court, or to plaintiff, or to a receiver and for judgment, adjudging plaintiff to be entitled to the same. The complaint was dismissed on plaintiff's opening on trial:

Held, no error; that the complaint did not state facts showing plaintiff to be entitled to the rents and profits; nor did it show any right in the plaintiff to intervene in the litigation between the defendants, as there was no allegation that they claimed in hostility to him, or that he could be in any

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way damaged by such litigation. (*Id.*)

30. The authority of the court to permit or refuse a supplemental pleading has not been changed or affected by the new Code (*sec.* 544). The declaration therein that the court, "in a proper case must, upon such terms as are just," permit a party to make such a pleading, simply presents the law as it existed before. (*Spears agt. Mayor, etc.*, 73 N. Y., 442.)

31. The party must apply to the court for leave, which must be granted, unless the motion papers show a case in which the court may exercise a discretion in granting or refusing leave. (*Id.*)

32. When such a case appears, the exercise of this discretion is not reviewable here. (*Id.*)

33. The original defendants herein having in their hands certain bonds belonging to the estate of a deceased person, of whom plaintiff was surviving executor, which came into defendant's possession as executor of a deceased executor, they refused to surrender the bonds until a sum claimed by them to be due the estate of their testator for commissions was paid; this claim plaintiff disputed. It was submitted to the surrogate who decreed that defendants were entitled to the commissions. Plaintiff thereupon paid the claim. The surrogate's decree was subsequently reversed. This action was thereupon brought against defendants as individuals, not in their representative capacity, to recover back the sum paid; the answer alleged that plaintiff "called upon the defendants and paid them" the money in question:

Held, that the pleadings concluded defendants from raising the question on appeal that they did not receive the money as individuals, and so that an action could not be maintained against

them personally; also that as executors of the deceased executor they had no right to take any charge or control of the bonds. (*Scholey agt. Halsey*, 73 N. Y., 578.)

POWER OF SALE.

1. Where an executor, clothed with a *power of sale* under a will, entered into an agreement with the persons beneficially interested under the will to purchase the land from them:

Held, that the agreement was not necessarily void. But if the transaction could be questioned it was for those interested in the land under the will, and not for strangers, to object. (*Clark agt. Jacobs, ante*, 519.)

PRACTICE.

1. The statutes regulating appeals from the general term of the marine court to the court of common pleas entirely assimilate the practice upon such appeals to that governing appeals to the court of appeals. (*McEntee agt. Little, ante*, 427.)

2. The practice of this court should therefore, be the same as that laid down by the court of appeals, viz., that appeals *must* be dismissed where it appears by the return that questions of fact were legitimately before the general term of the marine court, and that the evidence was such that the court *may* have reversed the judgment on the facts. (*Id.*)

3. Where a trial was had in the marine court before a judge and jury which resulted in a disagreement of the jury, and on the second trial a verdict was rendered for the plaintiff, and upon an appeal to the general term of the marine court, the case being before the general term in such a

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form that the exceptions and the evidence all passed under the review of that tribunal, which reversed the judgment and ordered a new trial with costs to abide the event; on appeal by plaintiff from this decision to the court of common pleas general term:

Held, that the appeal should be dismissed and the plaintiff remitted to her new trial. (*Id.*)

4. One Jewett, charged with an offense, demanded an examination before the police justice, whereupon the proceedings were adjourned. On the day to which they were adjourned, he waived an examination, and offered bail for his appearance at the general sessions. The police justice refused to accept the bail, and proceeded with the examination; whereupon he was served with a writ of *certiorari*, issued by a justice of the supreme court, under the *habeas corpus* act, and, on the hearing had on the return thereto, it was ordered that the police justice at once fully commit the said Jewett for trial, with or without bail, or fully discharge him.

Held, that no such order was authorized by the *habeas corpus* act. (*People ex rel. Phelps agt. Donohue*, 14 Hun, 188.)

5. *Seemle*, that the only power to interfere in such cases would be by the mandamus of a superior court, or that form of *certiorari* which would bring up for review the alleged illegal assumption of power. (*Id.*)

6. The provision of section 886 of the Code of Civil Procedure, directing that a party to be examined as witness before trial shall not, if a resident of this state, be required to attend in any county other than that in which he resides, or where he has an office for the regular transaction of business in person, is peremptory, and will be enforced by the courts. (*Marsh agt. Woolsey*, 14 Hun, 1.)

7. Section 779 of the Code of Civil Procedure, providing that when the costs of a motion directed to be paid are not paid as therein prescribed, all proceedings on the part of the party required to pay them are stayed without further direction of the court, does not apply to a motion to vacate the order imposing the costs, on the ground of irregularity. (*Id.*)

8. An order for publication of a summons, after reciting that it appeared from the affidavits that the party to be served was a necessary party defendant; that he could not, after due diligence, be found within the state, but had departed therefrom, and that his present place of residence could not, after such diligence used, be ascertained, directed that the summons be served upon him by publication thereof, in two papers therein specified, once in each week for six successive weeks, and by mailing copies of said *summons and complaint*, properly inclosed in a sealed wrapper, addressed to said defendant at his last place of residence, West Eighty-third street, near Eighth avenue, in New York, said publication and mailing to be commenced within three months from the date.

Held, that the order was void, because (1) it did not require a copy of the *order*, as well as of the summons and complaint to be served; (2) because it did not specify the post-office in which they were to be deposited; (3) because it did not require them to be mailed on or before the day of the first publication. (*McCool agt. Boller*, 14 Hun, 78.)

9. Upon an application to examine a party under sections 870, &c., of the Code of Civil Procedure, the affidavits must conform to the requirements of the sections, and an order made on argumentative affidavits will not be sustained. Upon an application by the defendant to examine the plaintiff, in an ac-

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tion brought by the latter to recover damages for an injury sustained in consequence of a defective pavement, the affidavits stated that the facts and circumstances connected with the happening of the alleged accident, and the hour of the day or night on which it is stated to have occurred, and the names of the bystanders or witnesses, if any there were, and the nature and extent of plaintiff's injuries, were not within the defendant's knowledge, and in order to enable defendant to prepare properly for the defense of the action, it would be necessary to examine the plaintiff before trial.

Held, that this statement of facts was not sufficient, or such as was required by the statute; that it did not show that the testimony was material and necessary for the party making the application, for the prosecution or defense of the action. (*Beach agt. Mayor*, 14 Hun, 79.)

10. This action was brought against one B. and others to compel a contribution for losses alleged to have been sustained by plaintiffs on a joint undertaking between himself and the defendants. After the commencement of the action B. died, and plaintiff, setting forth B.'s death, that he was a resident of California, and had left no property within this state, so that no personal representative could be appointed in this state, applied for leave to file a supplemental complaint, and asked leave to omit his name therefrom.

Held, that the application was rightly granted. (*Angell agt. Lawton*, 14 Hun, 70.)

11. Where a fund for the payment of dividends had been deposited by a railroad company with bankers, and was afterwards withdrawn by the company and passed into the hands of a receiver of the road:

Held, that the fund was to be regarded as a trust fund, and the

stockholder had a lien upon it, and such lien followed the funds in the hands of the receiver, and the stockholder might apply on petition for such dividend, and was not obliged to bring an action therefor. (*Matter of Le Blanc*, 14 Hun, 8.)

12. Upon an appeal from an order denying a motion to dismiss the summons and complaint, on the ground that both the plaintiff and defendant were non-residents, and that the subject-matter of the action was not situated, nor did the cause of action originate in this state:

Held, that the question as to the jurisdiction of the court could not be tried on a motion. (*Johnson agt. Adams Tobacco Co.*, 14 Hun, 98.)

13. That if the want of jurisdiction appeared on the face of the complaint, it should be taken advantage of by demurrer; and if it did not so appear it should be so set up in the answer. (*Id.*)

14. A person arrested on a warrant issued on an indictment found in any court of criminal jurisdiction may be let to bail under section 56 of 2 Revised Statutes, 728, by any justice of the supreme court of this state, provided that it shall appear that the court having cognizance of the offense and jurisdiction to try the same is not sitting at the time the application for bail is made. (*People agt. Clews*, 14 Hun, 90.)

15. A petition brought under chapter 838 of 1858 to vacate an assessment in New York city, is not a special proceeding, within the meaning of chapter 270 of 1854, relating to costs, but is merely a motion, and no costs can be allowed, except costs of a motion and disbursements properly made (*Matter of Jetter*, 14 Hun, 93.)

16. The allowance of costs in proceedings of this character is con-

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trary to the established and now universal practice in the first department. (*Id.*)

17. This action was brought to have 3,574 bonds of a railway company which were in the hands of the defendant, declared invalid and void, and to have them delivered up and canceled. The defendant claimed that they were valid, but offered to surrender 2,974 upon receiving fifty dollars per bond, which he claimed to have paid for them, and interest from the time of purchase. The court decided that plaintiff was entitled to the relief demanded in the complaint, and granted an extra allowance of \$2,000:

Held, That there was sufficient evidence as to the value of the subject of the action to authorize the allowance, and that the order granting it should be affirmed. (*Sickles* agt. *Richardson*, 14 *Hun*, 110.)

18. A copy of the summons and a verified complaint were served upon two of the defendants herein, and an unverified complaint on the third. The defendants served an unverified joint answer:

Held, that as their interests were several this could not be done, and that the two defendants upon whom the verified complaints were served must serve verified answers. (*Wendt* agt. *Peyser*, 14 *Hun*, 114.)

19. A judgment was entered in this action upon a decision of the general term, allowing the plaintiff to redeem a certain contract therein described, upon payment of the sum of \$15,000, within sixty days from the entry of such judgment, with interest from September 10, 1874, and costs. Subsequently, upon plaintiff's application, an order was made at special term staying all proceedings on the part of the defendants under the judgment until the hearing and decision by the court of appeals of

an appeal by the plaintiff, and extending the time to redeem until sixty days after such decision of the court of appeals. Upon an appeal from this order, *held*, that the special term had power to make it, and that it should be affirmed. (*Gray* agt. *Green*, 14 *Hun*, 18.)

20. The plaintiff in error was convicted of keeping and exposing for sale impure and unwholesome milk. The indictment commenced in the usual manner, and was in all respects regular to the first count, which was preceded by the words, "It was then and there presented as follows, that is to say, city and county of New York, ss.: The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oaths, present." Then followed the first count and then the second, which latter count was not directly preceded by any words showing it had been presented by the grand jury. Upon a writ of error to review the conviction, this omission was claimed to be a fatal defect:

Held, that as the indictment had not been demurred to, nor any motion made to vacate it, and as the defect was not pointed out until after judgment, and as the omission was in no degree prejudicial to the prisoner, that the objection should be overruled. (*Schrumpf* agt. *People*, 14 *Hun*, 10.)

21. The count alleged that the prisoner unlawfully held, kept, and offered for sale, the impure milk, "against and in violation of the provisions of the sanitary code:"

Held, that it was not necessary to set out the particular ordinance alleged to have been violated, especially as the objection was not taken until after judgment (*Id.*)

22. Under section 558 of the Code of Civil Procedure, relating to the issuing of orders of arrest, and pro-

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- viding that "at any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint shows that the cause is not one of those mentioned in sections 549 or 550 of this act," it is not necessary to state in the complaint the facts relied upon to justify the arrest; it is sufficient if they be shown by affidavits. (*Sloane agt. Livermore*, 14 Hun, 29.)
23. The order can only be vacated under such section when it affirmatively appears by the complaint that the cause of action is such that in no event could the defendant be arrested under the said sections, 549 or 550. (*Id.*)
24. The complaint in this action was to recover the value of work, labor and services rendered to the defendant by the plaintiff. Upon the complaint, summons and affidavits showing a fraudulent disposition of property by the defendant, an order of arrest was granted:
Held, that a motion made under said section 558, to vacate the said order was properly denied. (*Id.*)
25. Where the plaintiffs were induced by fraudulent concealment and representations on the part of the defendant to execute and deliver to him a joint release, and afterwards joined in an action to set aside such release and prayed for separate judgments in their favor for the balance of their respective claims:
Held, that the complaint was not objectionable as improperly uniting several causes of action. That the fact that they prayed for separate judgments for the respective amounts due to them, did not render the complaint multifarious. (*Smith agt. Schutting*, 14 Hun, 52.)
26. Where an application is made to compel an assignee, for the benefit of creditors, to render an account, he cannot defeat the allegation by alleging that the assignment has been rendered void by his own failure to file the bond and schedule of assets, as required by the statute. (*Matter of Furnum*, 14 Hun, 159.)
27. A county judge has power, upon the accounting of the assignee, to admit or reject a claim presented by a creditor, and to determine who are and who are not entitled to participate in the distribution of the estate. (*Id.*)
28. The fact that an assignee denies that any thing is due to one who applies to have him compelled to render an account, furnishes no reason why such application should be denied. (*Id.*)
29. Where upon the examination of a witness in proceedings supplementary to execution, the testimony actually given has been erroneously taken down, the witness has a right to have the minutes changed so as to conform to the testimony actually given by him, and the court has no power to compel him to subscribe his name to a statement which is not strictly true, even though its falsity be shown by a supplementary entry in the minutes. (*Shorwood agt. Dolen*, 14 Hun, 191.)
30. An attachment cannot be issued against a national bank before final judgment, even though it has property within this state, and is located and carries on business in another state. (*Rhorer agt. First Nat. Bank*, 14 Hun, 126; *Palmer agt. The Same*, 14 *id.*, 126.)
31. In an action upon contract it is not necessary to authorize the court to grant an order of arrest, on account of fraud in the contracting thereof, that the facts upon which such order is granted should be stated in the complaint. (*Taylor agt. Faas*, 14 Hun, 166.)

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82. The term "party," as used in section 870 of the Code of Civil Procedure, relating to the examination of parties to an action before trial, does not include the agents, directors or officers of a party, and in an action by or against a corporation, its agents, directors or officers cannot be examined thereunder. (*People* agt. *Mutual Gas Light Co.*, 14 *Hun*, 157.)

83. Under subdivision 5, of section 366 of the old Code, authorizing the county court to allow either party to amend his pleadings upon such terms as shall be just, in cases where a new trial may be had in that court, the court cannot allow an answer, interposed in the justices' court, consisting of a general denial, to be amended by inserting therein new and affirmative defenses, such as payment, set-off or counter-claim.

Seemle, that no amendments should be allowed which will entirely change the issues in the court below, but only such as will enable the parties fully and fairly to try such issues. (*Reno* agt. *Mills*, 14 *Hun*, 228.)

84. The defendant having had certain wool stolen from him, and suspecting the plaintiff and another of being the thieves, applied to a magistrate for a search warrant, his affidavit stating that the wool had been stolen, "and that he has good reason to suspect the said wool was so feloniously stolen and carried away by Parley Johnson and Richard P. Johnson;" a warrant was issued directing a search of "the barn, houses or store of Parley Johnson and Richard P. Johnson, of Oakville." Under this warrant the plaintiff's house, woodshed, store and grist-mill were searched, without finding the property. An action was brought by the plaintiff, to recover damages for an unauthorized search, against the defendant on the ground that he had directed and controlled the search:

Held, that the warrant was void on its face as being too uncertain and indefinite. That the affidavit of defendant was not sufficient to give the justice jurisdiction to issue a warrant. (*Johnson* agt. *Comstock*, 14 *Hun*, 237.)

85. In a notice of appeal to the county court one ground specified was, that "the justice rejected proper evidence offered by the appellant:"

Held, that this was sufficiently specific to authorize an examination of the question as to the rejection of evidence offered by the defendant to show that upon a sale of the property (an action for the conversion of which had been brought in a justice's court), the property was bid in by or for the benefit of the plaintiff for seven dollars and eighty-seven cents. (*Vedder* agt. *Van Buren*, 14 *Hun*, 251.)

86. Where the plaintiff at the time of commencing an action is an infant but arrives at full age before the trial thereof, the omission to procure the appointment of a guardian *ad litem* for him is a mere irregularity, which the defendant waives by pleading to the merits. (*Smart* agt. *Haring*, 14 *Hun*, 276.)

87. Plaintiff, by different attorneys, commenced two actions to foreclose the same mortgage. While both actions were pending, upon plaintiff's application, and against defendant's objection, an order was made discontinuing the second action on payment of costs. Subsequently plaintiff, on an *ex parte* application, procured an order vacating the former one, reviving the second action, and discontinuing the first. Thereafter the defendant moved to vacate the second order:

Held, that the application should be granted. 1. Because it was irregular to grant the order without notice to defendant who had

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appeared. 2. Because after an action has been discontinued by a party, it should not be again restored unless the order was obtained by fraud. (*Smith agt. Green*, 14 *Hun*, 529.)

38. The word "property," as used in subdivision 2 of section 459 of the Code of Civil Procedure, which authorizes the granting of orders of arrest in actions "to recover damages * * * for an injury to property, including the wrongful taking, detention or conversion of personal property," includes an injury to real as well as personal property, and an order of arrest may be granted in an action of trespass brought under section 4 of 2 Revised Statutes, 338, to recover damages for a forcible ejectment. (*Welch agt. Winterburn*, 14 *Hun*, 518.)

39. Where the cause of action set forth in the complaint and the ground of arrest are the same, the controversy should be left to an investigation at a regular trial, and should not be decided upon conflicting affidavits on a motion to vacate the order of arrest. (*Id.*)

40. The complaint in this action alleged that the plaintiff herein was theretofore duly personally served with a summons to appear before a justice of the peace having jurisdiction thereof, to answer in an action brought against him by the defendant, Creswell; that he did not appear before the justice, "well knowing that said Ann Creswell, had no cause of action against him, and to appear before said justice would be attended with great cost and expense;" that the said Ann appeared and put in a complaint, charging him with having converted certain articles of personal property belonging to her; that the complaint was false and was known to be so by the said Ann; that the said Ann went on the stand and committed perjury in swearing to the facts stated

in the complaint; that judgment was entered against him therein, execution issued against his property, and subsequently against his person; that, under the execution, he was confined in jail until discharged by taking the affidavit required by the statute; that plaintiff did not know of the judgment until it was too late to appeal therefrom; that the commencement of the said action and all the acts of the defendant were had and done unlawfully, wickedly, willfully and maliciously by said defendant to injure the plaintiff in his person and property:

Held, that, as the judgment rendered before the justice was in full force and effect, the court could not question but that it was rendered on sufficient evidence and in a just cause, and that the complaint did not therefore state facts sufficient to constitute a cause of action. (*Sailesbury agt. Creswell*, 14 *Hun*, 480.)

41. In this action, brought to recover the amount of a promissory note, the summons and complaint were served on June twenty-second. On July twelfth, defendant's attorney mailed, at Utica, a frivolous demurrer to the complaint, directed to plaintiff's attorney at Herkimer. On the morning of the thirteenth, plaintiffs called at the post-office at Herkimer, but did not find the demurrer, and entered judgment, having never received any notice of appearance from defendant. Thereafter, and on the same day, other judgments were entered against defendant, as it was alleged, in favor of his friends, and he made a general assignment with preferences, plaintiffs' debts not being preferred. Some \$300 was realized upon an execution issued under the judgments, but not sufficient to pay plaintiffs' judgment, unless given priority over the other judgments of the thirteenth. On July nineteenth, the demurrer was overruled as frivolous.

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Upon a motion to set aside the plaintiffs' judgment, *held*, that, as the circumstances tended to show that the defendants' attorney intended to prevent plaintiff from entering judgment until other judgments had obtained a preference, it was incumbent upon the said attorney to show precisely when the demurrer was mailed, and what time the first mail for Herkimer left on the next morning; that if it was mailed so late at night as to miss the first mail of the next morning, the judgment was regular. That, as the defendant failed to show these facts, the motion should be denied. (*Green agt. Howard*, 14 Hun, 434.)

43. When a party is entitled to have irregular proceedings set aside considered. (*Id.*)

43. Where an action in equity has been referred, and the referee has made a report in which he has passed upon the question of costs, in accordance with which report the costs have been taxed and a judgment entered, the special term has no power to strike such costs therefrom upon motion; the remedy of the party aggrieved is by an appeal from the judgment. (*Woodford agt. Bucklin*, 14 Hun, 444.)

44. In actions at law the rule is different, and the court may, in such actions, amend the judgment by increasing or decreasing the amount of costs included therein, or it may strike them out altogether. (*Id.*)

45. On May 14, 1877, the defendant appeared before a referee, duly appointed in supplementary proceedings instituted in this action, and, after having been partially examined, refused to answer certain questions put to her by the plaintiff; the proceedings were then adjourned until May twenty-first, on which day plaintiff appeared, but defendant did not.

On November 7, 1877, on plaintiff's application, an order was made, on the return of an order to show cause why the defendant should not be committed for a contempt in refusing to answer the questions, requiring the defendant to appear before the referee and be examined, and continuing the injunction already granted.

Upon an appeal from this order, *held*, that the delay of the plaintiff to institute the proceedings to punish the defendant for a contempt did not constitute an abandonment of the supplementary proceedings, and that the order was proper and should be affirmed. (*Stanley agt. Lovett*, 14 Hun, 412.)

46. Upon a motion to set aside a verdict for irregularity on the part of the jurors, it appeared that after the adjournment for the day, the jury having been charged, occupied the court-room, and found there the minutes kept by the justice holding the court; some of the jurors read portions of the minutes and commented thereon, and others attempted to do so, but were unable to make them out. The minutes did not contain all the testimony, nor were they used by consent of counsel:

Held, that the verdict subsequently arrived at was properly set aside for this irregularity. (*Mitchell agt. Carter*, 14 Hun, 448.)

47. Where in an action commenced in a justice's court, in which a counter-claim has been interposed, the defendant moves that the action be discontinued on the ground that the amount in dispute exceeds that over which the justice has jurisdiction, and such action is accordingly dismissed, and a new one brought in the supreme court, the defendant is estopped from claiming in the latter action that the justice had jurisdiction in the former one and that he is therefore entitled to costs. (*Bradner agt. Howard*, 14 Hun, 420.)

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48. This action was brought upon a bond and mortgage executed by Caroline Smith and William R. Smith, her husband, upon land belonging to the wife, to one Coolidge, and by him assigned to plaintiff's testatrix. Judgment for any deficiency that might arise was asked against W. R. Smith. Coolidge was dead. Smith was offered as a witness to prove usury in the loan to Coolidge:

Held, that his testimony was inadmissible under section 829 of the Code of Civil Procedure. (*Whitehead* agt. *Smith*, 14 *Hun*, 581.)

49. The defendant Horwitz having been arrested in an action brought to recover possession of personal property, an undertaking was given, conditioned that he should be at all times answerable to process, "and for the payment to the plaintiff of such sum as may, for any cause, be recovered against the defendant." Upon plaintiff's objection that the undertaking was not such as was required by section 211 of the Code, a new undertaking was given, conditioned for a return of the property as required by the Code. Plaintiff, having recovered a judgment, brought this action against the sureties to the first undertaking:

Held, that as it was not in the form required by the statutes, it was void, and could not be enforced.

Semble, that the second undertaking was valid; and that, as it recited that Horwitz had been arrested, the sureties were estopped from denying that he was under arrest and that the bond was given to release him therefrom. (*Cook* agt. *Horwitz*, 14 *Hun*, 542.)

50. Where, in supplementary proceedings, instituted by a judgment creditor, an injunction is served upon the debtor, and a person holding property belonging to him, and such proceedings are subsequently abandoned before

the appointment of a receiver therein, the lien acquired by the judgment creditor upon such property is lost, and is not revived or continued by the commencement of an action, in the nature of a creditor's bill against the debtor, the person who held the property, and one to whom it was subsequently transferred. (*Ballou* agt. *Boland*, 14 *Hun*, 355.)

51. Where in an action to recover the possession of personal property in which the property has been taken from the defendant and delivered to the plaintiff, judgment is finally entered in favor of the defendant, and a return of the property to him directed, no damages for the taking and withholding of the property so seized can be recovered by him in such action, unless a claim therefor has been set up in his answer. (*Whitcomb* agt. *Hoffman*, 14 *Hun*, 335.)

52. Where an appeal has been taken from a judgment of a justice's court involving questions of law only, and the case has been regularly noticed for argument and placed upon the calendar of the county court, the case will remain upon the calendar at subsequent terms without any further notice by either party; but it cannot be brought on for argument at any subsequent term, except by motion, of which at least eight days' notice must be given. (*Matthews* agt. *Arnold*, 14 *Hun*, 376.)

53. Under sections 682 and 683 of the Code of Civil Procedure, relating to attachments of property, one who has acquired a lien upon property subsequent to its attachment in an action brought by another creditor, to which action he is not a party, can only move to vacate such attachment upon affidavits made on behalf of said lienor as in no other way can the existence of his lien be shown.

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- (*Steuben County Bank* agt. *Alberger*, 14 *Hun*, 879.)
54. Such application falls under the second class of cases specified in section 688, and may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment recited in the warrant. (*Id.*)
55. Where a motion to set aside an attachment, issued upon an affidavit only, is made upon the affidavit upon which it was granted, and also upon the complaint, the plaintiff is entitled, upon the hearing, to read additional affidavits in support of the attachment. (*Ives* agt. *Holden*, 14 *Hun*, 402.)
56. The right of the general guardian of an infant to bring an action to recover money belonging to his ward, is not an exclusive one, and the infant himself may, by a guardian *ad litem*, duly appointed, bring an action to recover the same. (*Segelken* agt. *Meyers*, 14 *Hun*, 598.)
57. The general guardian may, in such case, be appointed guardian *ad litem*. (*Id.*)
58. Where a judgment of foreclosure directs lands, situate in the county of Kings, to be sold by a referee, instead of by the sheriff (as required by chapter 439 of 1876), such direction is a mere irregularity, and a sale by the referee is valid, and passes a good title to the purchaser. (*Dickinson* agt. *Dickey*, 14 *Hun*, 617.)
59. An offer to allow the plaintiff to take judgment for an amount therein specified, signed by the defendant's attorney, but to which the affidavit required by section 744 of the Code of Civil Procedure is not annexed, is a nullity, and the plaintiff is not required either to accept or reject it. He may proceed with the action, and pay no attention thereto; nor does he waive any right by retaining the same without objection. (*McFarren* agt. *St. John*, 14 *Hun*, 387.)
60. Where an indictment has been found in a court of oyer and terminer, an order may be made in that court sending the case to the court of sessions for trial, without giving any notice to the accused. (*Myers* agt. *People*, 14 *Hun*, 416.)
61. The court of sessions has since the passage of chapter 212 of the Laws of 1865, jurisdiction to try and convict a person indicted for robbery in the first degree. (*Id.*)
62. This action was brought in a justice's court to recover upon a claim originally held by one Bogart against the defendant, and by Bogart transferred to the firm of L. S. Lawrence & Co. This firm was composed of the plaintiffs and L. S. Lawrence. Upon the trial, defendant moved for a nonsuit on the ground that L. S. Lawrence should have been named as a plaintiff:
Held, that the motion was properly denied; that the objection to the non-joinder of proper parties plaintiff should have been taken by answer; and, not having been so taken, was waived. (*Frazier* agt. *Gibson*, 15 *Hun*, 37.)
63. Sections 144, 147 and 148 of the Code are, by subdivision 15 of section 63, made applicable to justices' courts. (*Id.*)
64. After an order had been made dissolving an insurance company, and appointing a receiver thereof, an order was made directing that a firm of attorneys be allowed to appear for certain policyholders, and that notice of all motions and all proceedings in court, either by the attorney-general or by the receiver, should be served on the firm, with liberty to it to appear on said motions and proceedings in behalf of such policyholders:

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Held, that the policyholders so represented did not become parties to the proceedings in such a sense as to authorize them to appeal from an order of the special term made therein. (*People agt. North America Life Ins. Co.*, 15 Hun, 18.)

65. In this action, brought to restrain the defendant from entering upon certain lots, and cutting and removing timber and bark therefrom, a temporary injunction was granted. Subsequently, and before trial, defendant died. More than two years after his death, his heir at law and administratrix applied for an order requiring the plaintiff to substitute them as defendants, and continue the action by supplemental complaint, or that the action be discontinued:

Held, that an order to that effect was properly granted, and that the same should be affirmed. (*Johnson agt. Elwood*, 15 Hun, 14.)

66. April 10, 1877, a warrant of attachment, summons and complaint against Josiah Strayer were delivered to the sheriff for service April 14th, a levy was made under the warrant. On April 18th, Strayer died, not having been served with the summons. On May 28th, an order was granted allowing the action to be continued by the service of a summons and complaint therein on the defendants, his administrators; and, on June 18th, they were served upon them.

Held, that, as the summons was not served within thirty days from its issue, the warrant of attachment and the levy thereunder were void. (*Kelly agt. Countryman*, 15 Hun, 97.)

67. The complaint alleged that the defendant entered upon the plaintiff's close, tore away and destroyed his watering trough, diverted a stream of water running therefrom from its natural channel, and turned it upon plaintiff's meadow.

The answer alleged that there was a highway running through plaintiff's close; that defendant entered as overseer of highways, by direction of the commissioner, and repaired the highway and watering trough, and denied that he diverted the stream from its natural channel. The referee found that the watering trough was on the side of a highway, and that defendant was overseer, but also found that defendant wrongfully diverted the stream from its natural channel, and gave judgment for plaintiff for one dollar.

Held, that the plaintiff did not recover upon a cause of action in which a claim of title to real property came in question, within section 304 of the Code, and that defendant was entitled to costs. (*Learn agt. Currier*, 15 Hun, 184.)

68. Where an action is brought by the people to dissolve a corporation and forfeit its rights, privileges and franchises, one to whom it has leased property to be held during the term of its corporate existence, has no right to apply to be made a party defendant, under section 452 of the Code of Civil Procedure, in order to contest the forfeiture of its franchises. (*People agt. Albany, Vermont and Canada R. R. Co.*, 15 Hun, 126.)

69. *Semble*, that, where one corporation has legally assigned some of its franchises to another, such franchises can only be annulled in an action against the corporation to which they have been assigned. (*Id.*)

70. Where the payee of a non-negotiable note seeks to charge one who has indorsed the same prior to its delivery to him, he must allege in the complaint that such person indorsed the note with intent to become liable thereon, either as maker or guarantor. (*Cawley agt. Costello*, 15 Hun, 303.)

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71. *Quare*, whether the maker and guarantor could be joined as defendants in the same action, under section 120 of the Code of Civil Procedure. (*Id.*)
72. Where, under section 65 of the Code of Civil Procedure, notice to appoint another attorney is served upon a party, whose attorney has died, all proceedings are stayed for thirty days, and a motion to dismiss an appeal for a failure to appoint an attorney, made within that time, is premature. (*Hickox* agt. *Weaver*, 15 *Hun*, 375.)
73. Where there is more than one party, both must be notified. (*Id.*)
74. *Semble*, that, under section 1302 of the Code of Civil Procedure, the respondent may proceed in the same manner as it is therein provided that the appellant may. (*Id.*)
75. An appeal from a decree of a county judge, made upon the final accounting of an assignee for the benefit of creditors, is subject to the rules governing appeals from final judgments rendered by the county court, under section 1340 of the Code of Civil Procedure, and to be effectual the security required by section 1341 must be given. (*Matter of Beckwith*, 15 *Hun*, 326.)
76. Under the Code of Civil Procedure, no appeal lies from an order sustaining or overruling a demurrer. (*Miller* agt. *Sheldon*, 15 *Hun*, 220.)
77. The only remedy under such Code is by an appeal from the judgment, whether final or interlocutory, entered upon the decision of the demurrer, and no appeal lies until such judgment is entered. (*Id.*)
78. In this action submitted upon agreed facts, under section 1279 of the Code of Civil Procedure, the city of Buffalo asked the court to determine which of the two defendants was entitled to the office of health physician of the city, in order that it might pay to him his salary.
Held, that the right to the salary depended upon the right to the office, and that the right to a public office could only be tried in an action in the name of the people. (*City of Buffalo* agt. *Mackay*, 15 *Hun*, 204.)
79. A justice of the peace, by failing to appear within one hour after the time to which the case has been adjourned, loses jurisdiction of the action, and the same is thereby discontinued. (*Flint* agt. *Gault*, 15 *Hun*, 213.)
80. Under section 1281 of the Code of Civil Procedure, as under section 372 of the old Code, a controversy submitted upon agreed facts, is to be tried at the general term, and it is irregular to have it heard in the first instance at special term. (*Waring* agt. *O'Neill*, 15 *Hun*, 105.)
81. A special verdict must contain all the facts necessary to sustain the judgment. (*Casey* agt. *Dwyer*, 15 *Hun*, 153.)
82. One who has sought and enjoyed an extension of time within which to comply with a peremptory mandamus, cannot thereafter appeal from the order directing that the mandamus issue. (*People ex rel. Garbutt* agt. *Rochester and State Line R. R. Co.*, 15 *Hun*, 188.)
83. The plaintiffs alleged that, by a resolution of their board, the county treasurer was authorized to borrow \$20,800.44; that, pretending to act thereunder, he issued seventy-three notes in the name of the county, amounting to \$188,681, that of these notes only \$20,800.44 were valid; that each of the defendants held some of the notes; that several had commenced sepa-

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rate actions, and the others intended to do so; that the valid were indistinguishable from the invalid notes; that they were willing to pay the \$20,800.44, and prayed that the defendants might be restrained from prosecuting separate actions, and for an interpleader between them and a surrender of the invalid notes:

Held, that the action could not be sustained as a bill of interpleader, because the plaintiffs denied that they owed the defendants what they severally claimed, and because the defendants did not claim the same debts, but distinct and several debts. (*Supervisors of Saratoga* agt. *Deyo*, 15 *Hun*, 526.)

84. That it could not be sustained as a bill *quia timet*, because the causes of action, being on notes, would be barred in six years, and plaintiffs could produce, on any trial, any evidence on which they now relied. (*Id.*)

85. That it could not be sustained as a bill to prevent a multiplicity of suits, because the defendants did not all stand in the same position towards the plaintiff, and the success or defeat of one would not be the success or defeat of all. (*Id.*)

86. On plaintiff's application, it was ordered that he "have leave to discontinue the action" upon payment of costs, and that upon payment thereof he might enter an order discontinuing the action:

Held, that the plaintiff might at his election refuse to accept the terms imposed by the order and continue the action. (*Society of N. Y. Hospital* agt. *Coe*, 15 *Hun*, 440.)

87. *Quare*, as to the right of the defendant to move for an additional allowance of costs, after the entry of an order which provided "that the plaintiff have leave to discontinue the above-entitled action upon payment of the defendant's costs up to the present time, with

costs of this motion, said costs to be adjusted by the clerk of this court." (*Id.*)

88. In order to authorize an order for the examination of the defendant, at the instance of the plaintiff, under section 870 of the Code of Civil Procedure, an affidavit must be presented showing the nature of the action, the substance of the cause of action, and of the judgment demanded, and after answer the nature of the defense, and also the facts showing that the testimony is material and necessary for the party making the examination. (*Greer* agt. *Allen*, 15 *Hun*, 482.)

89. An affidavit stating that the action "is brought upon a contract, and that the judgment demanded is for the sum of six hundred and ninety dollars with interest; that the answer of the defendant is a general denial," and that "the examination of the defendant is necessary," and also stating the matters as to which the examination is desired, is not sufficient. (*Id.*)

90. Where the facts and circumstances stated are not sufficient to satisfy the judge, he is not bound to grant the order, but should refuse the same. (*Id.*)

91. *Semble*, that, where a judgment in an action to foreclose a mortgage provides "that if the proceeds of sale be insufficient to pay the amount so reported to be due to the plaintiff, the said referee specify the amount of such deficiency in his report of sale, and that the defendant pay the same to the plaintiff," it is unnecessary to apply to the court for an order confirming the report of the referee, before issuing execution against the defendant for the amount of the deficiency, nor is it necessary to enter any further judgment upon the filing of the said report. (*Moore* agt. *Shaw*, 15 *Hun*, 428.)

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92. *Seem*, that it may be necessary to have the report confirmed, in order to perfect the title, as between the mortgagor and purchaser. (*Id.*)
93. The complaint in this action alleged the sale of goods by the plaintiffs to the defendant; that the sale of a portion of them was procured by his fraudulent representations, and that since the contracting of the debts the defendant had disposed of his property with intent to defraud his creditors. Upon the complaint and affidavits, an order of arrest was granted, on the ground that defendant had disposed of his property with intent to defraud his creditors:
Held, that although, if the order had been granted on account of the fraudulent representations, it could not be sustained, as the plaintiffs sought to recover for the sale of other goods not procured by them; yet as it was granted for a cause applicable to the whole claim, it was proper, and should be affirmed. (*Bassett* agt. *Pitts*, 15 Hun, 464.)
94. Section 321 of the Code, rendering one taking an assignment of a cause of action, after the commencement of an action thereon, liable for the costs, was not repealed by section 15 of the Code of Civil Procedure. (*Morrison* agt. *Lester*, 15 Hun, 538.)
95. A bailable attachment, returnable before the court, should be issued, and upon the return thereof the court should determine whether or not he wrongfully refuses to pay the costs. He cannot be compelled to do more than to apply such property as he has to their payment. (*Id.*)
96. Payment of the costs by such assignee cannot be enforced by a *capias ad satisfaciendum*. (*Id.*)
97. A creditor of a firm, who has recovered a judgment against one member thereof, upon his guaranty of a firm debt, and issued an execution thereon, which has been returned unsatisfied, cannot maintain an action, in the nature of a creditor's bill, to reach the equitable assets of the firm; a judgment must first be recovered against the firm, or the surviving partner thereof, and an execution be issued thereon and returned unsatisfied. (*Lewisohn* agt. *Drew*, 15 Hun, 467.)
98. After a trustee had been discharged, his bond canceled, and the trust funds transferred to his successor, a petition was filed by the *cestui que trust* to set aside his discharge and compel him to pay over the amount of certain of the securities so transferred, on the ground that they were improper investments, and had subsequently proved to be worthless; *held*, that by appearing and proceeding to an investigation upon the merits, without taking the objection that an action, and not a petition, was the proper remedy for the *cestui que trust*, the objection was waived, and could not be first raised upon an appeal.
 The power of a court of equity to proceed by petition, instead of action, considered. (*Matter of Foster*, 15 Hun, 387.)
99. The marine court of the city of New York is a court of record, and a justice thereof has power to issue a warrant for the arrest and commitment of a party in proceedings under the act of 1831 (*chap.* 800) to abolish imprisonment for debt. (*People ex rel. Lowenberg* agt. *Donohue*, 15 Hun, 418.)
100. The supreme court may, in its discretion, allow a writ of *certiorari*, even in cases where there is a remedy by appeal. (*Id.*)
101. Where, in an action tried by a referee, a fact is material, and the referee refuses to make any find-

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- ing upon the subject, and the court, on motion, refuses to send the case back for a finding as to such question of fact, a judgment of general term affirming the judgment entered upon the report of the referee, on appeal to this court, will be reversed but not the judgment entered on the referee's report; the order will be, that the case be sent back to the referee to pass upon the question of fact; and, when passed upon, the case can be reheard at general term. (*Potter agt. Carpenter*, 71 N. Y., 74.)
102. When an appeal to this court has been dismissed for failure to serve papers, and the *remittitur* has been sent down, judgment entered thereon and execution issued, a motion will not be entertained to reinstate the appeal; the appellant should move in the supreme court to have the proceedings there vacated, and the *remittitur* returned here, to the end that he may then make his motion for relief. (*Jones agt. Anderson* 71 N. Y., 599.)
103. A refusal of a referee to find a fact not incontrovertibly proved no ground of exception, if party desires findings, must apply to court for order requiring supplemental report. (*See Putnam agt. Furnam*, [Mem.] 71 N. Y., 590.)
104. Where in case tried by a jury there is no motion for a nonsuit or exception to charge the verdict is final as to facts. (*See Mumby agt. Jackson*, 71 N. Y., [Mem.] 599.)
105. Where upon the trial of an action, after plaintiff has opened his case the complaint is dismissed on the ground that it does not state facts sufficient to constitute a cause of action, and plaintiff without asking leave to amend, excepts to the decision and appeals, the complaint will be treated as if it had been demurred to, and the sole question presented on appeal is whether it sufficiently states a cause of action. (*Sheridan agt. Jackson*, 72 N. Y., 170.)
106. The authority of the court to permit or refuse a supplemental pleading has not been changed or affected by the new Code (*sec. 544*). The party must apply to court for leave, which must be granted, unless the motion papers show a case in which the court may exercise a discretion in granting or refusing leave. (*Spears agt. Mayor, eto.*, 72 N. Y., 442.)
107. The decision of the general term reversing proceedings of the board of fire commissioners of the city of New York, was appealed from as from an order, and was so heard:
Held, that the appeal was from a judgment, and should have been heard as such in its regular order on the calendar. (*People ex rel. Munday agt. Bd. Fire Comr's.*, 72 N. Y., 446.)

PRINCIPAL AND SURETY.

1. A creditor is under an equitable obligation to obtain payment from the principal debtor, and the surety can, by a proper request, compel the creditor to proceed to recover the debt, and his neglect to do so will exonerate the surety, (*Mutual Life Insurance Co. agt. Davies, ante*, 440.)
2. But in order to work such result the request to prosecute must be *full and explicit* and accompanied by no conditions. (*Id.*)
3. Thus where a mortgagor who had, through an assumption of the mortgage debt by others, become, in equity, surety as to them, called upon a clerk in the employment of the mortgagee (a corporation) and requested that the mortgage should be foreclosed if *taxes and assessments were allowed to accumulate and should be in arrear*:
Held, that this did not amount

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to a full and explicit request to foreclose the mortgage. (*Id.*)

4. When it is sought to charge a corporation with notice to, or with acts or omissions of, its agents, it must appear that the notice was communicated to, or that the act or omission proceeded from, a person in the employment of the corporation charged with some duty in the premises. (*Id.*)

5. A mere forbearance to collect a debt will not discharge a surety. A creditor may refrain from taking proceedings, or abandon those he has commenced, provided he discharges no lien without releasing a surety. (*Id.*)

PRIVILEGED COMMUNICATION.

1. Every communication made to an attorney or counselor by a client, for the purpose of getting advice as to the law applicable to the facts so stated, is privileged. (*Bacon* agt. *Frisbie*, 15 *Hun*, 26.)

PROMISSORY NOTE.

1. Where the plaintiff receives a note from the payee in payment of a precedent debt, but surrenders no security or evidence of indebtedness and parts with no value, he is not a *bona fide* holder for value, and the note in his hands is subject to all defenses, legal and equitable, which existed against it in the hands of the original payee. (*Turner* agt. *Treadway*, ante, 28.)
2. The spirit and purpose of all the decisions lead to the establishment of the general principle that a *bona fide* holder of negotiable paper fraudulently obtained or diverted, is one who receives it before maturity without notice and parts with value for it. (*Phoenix*

Insurance Company agt. *Church*, ante, 29.)

3. Receiving a diverted note upon surrendering a past due check of the party from whom it is received is not a parting with value within the rule, because the check is merely evidence of a debt which still remained collectible. The reason stated. (*Id.*)

4. Where a plaintiff receives from the payee or holder thereof a diverted note in payment of a precedent debt and in consideration thereof alters his position by surrendering some security or evidence of indebtedness; he becomes a *bona fide* holder for value of the note received so as to shut out defenses thereto which otherwise might have been made. The reasons stated. So held, upon a reargument of the appeal herein and the present decision, in effect, reverses that previously rendered in the same case, reported, ante, page 29. (*Phoenix Insurance Company* agt. *Church*, ante, 493.)

PROOF OF SERVICE.

1. Where the summons and other papers were placed in the hands of a deputy sheriff, which he served, but died before making proof of service; on affidavits showing statements made by the deputy while he was sick as to service, and the times and places, the sheriff was directed to make proof of service, under his certificate, in accordance with such affidavits. (*Barber* agt. *Goodell*, ante, 364.)

PROPERTY CLERK.

1. The property clerk of the New York Municipal Police Department has no right to retain property from its rightful owner after the prosecution which gave rise

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to his possession has ceased; and in case of replevin proceedings he must, like any other public officer, obey the lawful order and process of the court. He cannot make a conditional compliance. If, however, there be any reason why the property, for public purposes, should remain in the possession of the property clerk, his course is to apply to the court to control its own process. (*Lynch* agt. *St. John*, ante, 144.)

PUBLIC ADMINISTRATOR.

1. The mayor, aldermen and commonalty of the city of New York are liable for all moneys received by the public administrator according to law, and for the faithful execution of the duties of his office. But for acts illegal and done outside of his office the city is not liable. (*Douglas* agt. *The Mayor*, ante, 178.)

2. Thus where the public administrator, who has in certain cases authority to take charge of the goods, chattels and personal effects of *persons dying intestate*, took into his possession money and property of a *third person* as of the effects of a decedent intestate: *Held*, that the city was not responsible for his act. (*Id.*)

3. *Levin* agt. *Russell* (49 N. Y., 254) applied.

Also, held, that the record of a judgment against the public administrator, as such, is not evidence in an action against the city of New York, to establish a liability, where the judgment was recovered for acts of the public administrator, which he was not by law authorized to perform. (*Id.*)

READJUSTMENT OF COSTS.

1. A party complaining of any proceeding in a cause, must embody

all his objections in one motion; the court will not permit him to make separate motions for each objection he may have to make. (*McLean* agt. *Hoyt*, ante, 351.)

2. Where costs had been adjusted and inserted in the judgment without notice of adjustment, on motion by plaintiff for an order setting aside the adjustment of costs and for readjusting the same, it is not only competent but under the practice, as settled, the plaintiff has the right to require, as part of the order, a provision for the amendment of the judgment and docket. (*Id.*)
3. But where, upon a motion for readjustment, the moving party neglects to include this provision in the relief sought, a subsequent motion, for such purpose, will be denied. (*Id.*)

RECEIVER.

1. Although section 298 of the Code confers upon a county judge, at chambers, the power to appoint a receiver in proceedings supplementary to execution, yet with the appointment his authority over him ceases, and the receiver is thereafter subject to the control of the court in which the judgment was obtained; or if the judgment was upon a transcript from a justice's court, filed in the county clerk's office, the receiver is subject to the control and direction of the county court. (*Pool* agt. *Safford*, 14 Hun, 369.)

2. A receiver, appointed in supplementary proceedings under section 292 of the Code, is vested with the real estate of the debtor by virtue of his appointment, the filing of the security required, duly approved, and the entry and recording in the proper clerk's office of the order of appointment, without any conveyance being made to him by the judgment

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debtor. (*Wing agt. Dissc*, 15 *Hun*, 190.)

8. A county judge has power to accept the resignation of a receiver in supplementary proceedings and to appoint his successor. (*Id.*)

4. *Quære*, as to the power of a receiver of an insolvent insurance company to submit a controversy upon an agreed statement of facts, under section 1279 of the Code of Civil Procedure. (*Waring agt. O'Neil*, 15 *Hun*, 105.)

5. The plaintiff recovered a judgment against the defendant, and upon the return of an execution unsatisfied, instituted supplementary proceedings thereon, and procured an order requiring one Lathrop, the receiver of the Central Railroad Company of New Jersey, to appear and be examined as to a debt owing by the railroad corporation to the defendant, one of the employees:

Held, that, although the money was due from the receiver to the defendant, a court of this state would not make an order requiring him to pay it over to the plaintiff. (*Smith agt. McNamara*, 15 *Hun*, 447.)

6. Where an action is brought by a judgment creditor, on behalf of all other judgment creditors as well as himself, to set aside fraudulent conveyances of the debtor's real estate, a judgment is not improper adjudging the appointment of a receiver to take a conveyance of and to sell the real estate. (*Shand agt. Hanley*, 71 *N. Y.*, 820.)

7. Where, in such action, the holder of a lien or claimant of other interest in the property is made a party defendant, and the validity of the lien or claim is made a question in the action, and is disposed of adversely to such defendant, a sale and conveyance by the receiver will vest in his grantee a

title superior to such lien or claim. (*Id.*)

8. Where the assets of an insolvent life insurance company have passed into the hands of a receiver, appointed in proceedings under the general insurance law, the holder of a policy which matured by the death of the insured prior to the appointment of the receiver, has no legal right to demand an adjustment and payment of his claim before a distribution of the assets among all the creditors entitled to share therein. (*In re People agt. Secur. L. Ins. Co.*, 71 *N. Y.*, 322.)

9. If the court has the power to direct the payment by the receiver of an insolvent life insurance company of such a claim without awaiting the presentation and liquidation of all outstanding claims it is within its discretion, and the exercise of this discretion is not reviewable here. (*Id.*)

10. *It seems*, that the court, to whom such an application is presented, should require a very clear case, not only that the claim is a valid, legal demand; but that the assets ready to be distributed, are abundantly sufficient to pay all charges upon the fund. (*Id.*)

11. Where, upon application to require the receiver of an insolvent life insurance company to adjust and pay losses which occurred prior to his appointment, the holders of unexpired policies come in upon their own motion, as contestants, to litigate the petitioner's claim in conjunction with the receiver, such intervening creditors are not, as of right, entitled to costs upon denial of the motion or upon appeal, either out of the fund or against the adverse party. (*Id.*)

12. *It seems*, that the receiver, in case he succeeds, is entitled to costs. (*Id.*)

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13. Where an insurance company gave its check upon a trust company, in payment of a loss, the company having at the time on deposit a sum exceeding the amount of the check, but, prior to its presentation, a receiver of the company was appointed, who withdrew all the funds deposited, *held*, that the check not having been drawn on a particular fund, did not operate as an equitable assignment *pro tanto* of the deposit; and that the claim having been only liquidated, not paid, when the company failed and went into the hands of the receiver, whereby the rights of all the creditors became fixed by statute, the payee of the check was not entitled to have the same paid by the receiver out of the funds in preference to the claims of other creditors. (*Attorney-General agt. Cont'l Life Ins. Co.*, 71 N. Y., 825.)

RECORDING ACTS.

See MORTGAGE.

Bank for Savings agt. Frank, ante, 408.

1. Neglect to record a mortgage given upon the interest of a vendor to a contract of sale of land—how affected by conveyance to vendee who gives back a mortgage. (*See Westbrook agt. Gleason*, 14 Hun, 244.)
2. The provision of the recording act providing that a deed, although absolute in terms, which, by any other written instrument, shall appear to have been only intended as a mortgage, shall be considered as such, and that no advantage should be derived from the recording thereof, unless every writing "explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith" (1 R. S., 756, sec. 3), does not require that every conveyance of land upon condition shall be recorded as a

mortgage, or that any condition annexed to a grant shall make it a mortgage; it refers only to those conditions which are analogous to those of a mortgage—i. e., by which if certain acts are performed, the deed shall not operate, but shall become void. (*Macaulay agt. Porter* 71 N. Y., 173.)

REFEREE.

1. The failure of a referee to be sworn, in pursuance of the provisions of section 1016 of the Code of Civil Procedure, is a mere irregularity and not a jurisdictional defect and may be waived by implication (*Affirming, S. C.*, 55 How., 342). (*Nason agt. Luddington*, ante, 172.)
2. A referee appointed to sell in a foreclosure action is entitled to the same fees and percentage (commissions) as might be taxed for the same services had they been performed by the sheriff, not exceeding in the aggregate fifty dollars. (*Wallbridge agt. James*, ante, 185.)
3. Where there were three sales of the mortgaged premises, all of which it appears were regularly made, the last one only having been consummated by the delivery of the deed, twenty-five per cent of the purchase-money being paid in on each of the first two sales, both of which fell through; on the third sale, the premises were struck off and sold for \$5,700 cash, and the title passed; the defendant took the benefit of the purchase, and had the benefit of the moneys paid in on the prior sales, he agreeing to pay and satisfy the referee's fees and expenses:
Held, that the referee was entitled to fifty dollars for the third and consummated sale, inasmuch as the taxable fees and percentage, or legal commissions on the sale alone would amount to the

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full sum of fifty dollars. He is not entitled to commissions on the first two sales. He can have commissions only on such moneys as were actually or constructively received and paid over under the decree. For making the two ineffectual sales, the referee is entitled to two dollars and fifty cents each, *i. e.*, for receiving and entering the decree in his book, fifty cents; advertising the property for sale, two dollars; in all fifty-five dollars (*Per BOCKER, J.*) (*Id.*)

4. Where a resale is had on the failure of the purchaser to complete his purchase, the costs of the resale are properly to be deducted from the deposit (made by the purchaser). Therefore the referee could retain his fees (including commissions), from that deposit, in each of the sales not completed, and as the defendant was, by the agreement, to pay all the referee's fees, &c., he was liable for these (*Per LEARNED, J.*) (*Id.*)

5. There was but one sale made; the others were not perfected, and the fees should be fifty dollars, as the extreme limit of the law of 1876 (*Per BOARDMAN, J.*) (*Id.*)

6. If a referee refuse to proceed in the reference he may be removed and another appointed in his place. (*Ellsworth agt. Smith, ante, 237.*)

7. It seems, that, on sufficient grounds, the court would require the deposit of money to meet the fees of the referee before he would be required to proceed; but such requirement would rest on something unusual and peculiar to the particular case. (*Id.*)

See CONTEMPT.

Fischer agt. Raab, ante, 218.

The People ex rel. Fischer, agt. Retilly, ante, 223.

8. Notice by, to one party that re-

port was ready— if within the sixty days' time for making report, other party cannot thereafter elect to end reference, though the report is left in the referee's hands (*Code of Procedure, sec. 273*). See *Waters agt. Shepherd, 14 Hun, 223.*)

9. Referees appointed to hear an appeal from an order, made by commissioners of highways, discontinuing a highway, cannot pass upon the question of the jurisdiction of the commissioners to make such order, but are confined to an examination of the case upon the merits. (*People ex rel. Bailey agt. Sherman, 15 Hun, 575.*)

10. The discontinuance of the highway was objected to by some because another road, which was claimed by others to have rendered the highway in question unnecessary, had upon it a steep hill. Upon the hearing, a paper, signed by the owner of the land upon which the hill was, consenting to allow the road to run through his orchard, if the road in question was closed, was received in evidence.

Seem, that it was competent, as it tended to show that the objection made, on account of the hill, could be obviated. (*Id.*)

11. The decision of the referees, or that of any two of them, is final and is not subject to review either by *certiorari* or appeal.

A decision made by two referees, the other being present, is valid. (*Id.*)

12. Referees are not county officers within the meaning of section 6 of 1 Revised Statutes, page 381, and can in no event be personally charged with the costs of a *certiorari* issued to them to review their decision. (*Id.*)

REFERENCE.

1. It seems that an order of reference may be had in an action by an at-

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torney for professional services. (*Perry* agt. *Rollins*, ante, 242.)

2. *Quare*. Is *Martin* agt. *Windsor Hotel Company* (10 *Hun*, 804) to be followed, or is a different rule to be established? (*Id.*)

See INSURANCE (LIFE).

Attorney-General agt. *Atlantic Mutual Life Insurance Company*, ante, 891.

8. Where there is conflicting evidence upon a question of fact in an action on trial before a referee, a request on behalf of one of the parties to find the fact as claimed by him and a refusal by the referee, is not the ground of an exception. (*Potter* agt. *Carpenter*, 71 *N. Y.*, 74.)

4. But, where the fact is material, and the referee refuses to make any finding upon the subject, and the court, on motion, refuses to send the case back for a finding as to such question of fact, a judgment of general term affirming the judgment entered upon the report of the referee, is error. (*Id.*)

5. In such case, on appeal to this court, the judgment of the general term will be reversed, but not the judgment entered on the referee's report; the order will be that the case be sent back to the referee to pass upon the question of fact; and, when passed upon, the case can be reheard at general term. (*Id.*)

6. To ascertain damages by reason of injunction, when order for, improper. (*See Palmer* agt. *Foley*, 71 *N. Y.*, 106.)

7. Where upon trial before a referee, his decision upon objections to evidence is reserved, and no exception to the mode of treatment is taken an objection to it cannot be considered upon appeal. (*Holden*

agt. *N. York and Erie Bank*, 72 *N. Y.*, 287.)

8. The report of a referee assessing the damages in consequence of an injunction, when duly confirmed, is, in the absence of fraud, conclusive upon the sureties to the undertaking given on the granting of the injunction, although they had no notice of the proceedings. It is, however, the safer and fairer course to give the sureties notice. (*Jordan* agt. *Volkering*, 72 *N. Y.*, 300.)

RELEASE.

1. Evidence that a release of a cause of action was obtained by false and fraudulent representations is competent. (*Gould* agt. *Cayuga County National Bank*, ante, 505.)

2. Knowledge by an officer of a bank that such representations were false binds the bank, though such officer represents to the bank that such representations are true. (*Id.*)

3. Where no consideration is paid by a party for a release of a cause of action, it is no defense to an action to set aside such release that the party bringing the action has not returned, or offered to return, the property received under the settlement. (*Id.*)

4. On the facts stated: *Held*, that the officers of the bank had the means of ascertaining whether plaintiff's bonds had been replaced. The vault was under their control, and it was the proper place to deposit the bonds if they had been returned. (*Id.*)

5. That S. having told the president and other officers that he had returned the bonds, and such statement being false, does not excuse the bank from liability on a claim of an outside party. (*Id.*)

6. The bank cannot escape the con-

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sequences of a false representation made to a person dealing with it, and who, by relying on it is injured, by proving that its officers, or some of them, were told the falsehood by some other agent or officer of the corporation. (*Id.*)

7. The party has the right to rely upon the representation as being matter within the personal knowledge of the person making it, unless the source from which the information was obtained was disclosed to him before he entered into the contract. (*Id.*)
8. Plaintiff had the right to assume that the person making the representation as to the return of his bonds had personal knowledge of the fact; and especially had he the right to assume they were not making it upon the faith alone of the cashier, S. It cannot be doubted but that the representations influenced plaintiff. (*Id.*)
9. The fact that plaintiff made no offer to return the property and value received under the release, before this action was commenced, does not affect his rights if, as it is claimed, the defendant paid nothing under the settlement. (*Id.*)

REMOVAL OF CAUSE.

1. To entitle a party to the removal of a cause from a state court to a United States court it is not sufficient for the petitioner to state in his petition that it is a proper case for removal, but the facts showing that the case is a proper one to remove under the law must be set forth. (*Lalor* agt. *Dunning*, ante, 209.)
2. Where, though the order for removal was obtained at special term, it was obtained *ex parte* the plaintiff should not be driven to appeal but should be permitted to apply to the special term for its vacation. (*Id.*)

3. The decision of a motion is never *res adjudicata*. (*Id.*)

REPLEVIN.

1. This was an action of replevin to recover goods in the hands of the sheriff, seized by him under executions issued against one Cummings, plaintiffs alleging that Cummings had purchased the goods from them by means of false and fraudulent representations, and with intent not to pay for them. Upon the trial, a number of judgments recovered against Cummings—under two of which the executions were issued—were, against defendant's objection and exception, received in evidence: *Held*, that they were admissible, as they tended to establish the falsity of the representations and the preconceived intention not to pay for the goods. (*Hersey* agt. *Benedict*, 15 *Hun*, 282.)
2. When a vendor has disaffirmed a sale on account of fraud, he may reclaim by an action in replevin such of the goods sold as are within his reach, and at the same time maintain an action against the vendee to recover damages for those that have been disposed of. (*Id.*)

RES ADJUDICATA.

1. The decision of a motion is never *res adjudicata*. (*Lalor* agt. *Dunning*, ante, 209.)

RULE 5.

1. A reference to an opinion in an action as reported in the Supreme Court Reports, is not a substitute for a compliance with the rule of this court (rule 5), requiring the printing in a case of any opinion of the court below. (*Bustable* agt. *City of Syracuse*, 72 *N. Y.*, 64.)

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RULE 25.

1. The provisions of Rule 25 that "whenever an application is made *ex parte* for an order the affidavit shall state whether any previous application has been made for such order, and if made to what court or judge, and what order or decision was made thereon," was not intended to apply to orders in supplementary proceedings; or if intended to apply to them such intent is inoperative. (*Schanck* agt. *Conover*, ante, 437.)

SEAL.

1. A contract or covenant under seal cannot be modified, before breach, by a parol executory contract. (*Coe* agt. *Hobby*, 72 N. Y., 141.)

SEPARATE TRIAL.

1. Where two or more defendants are jointly indicted for a felony, either one is absolutely entitled to a separate trial, if he demands it. (*Babcock* agt. *People*, 15 Hun, 347.)

SERVICE.

1. Service of an order requiring a party to pay and to show cause, in default thereof, why he should not be punished for contempt, is properly made on him personally. If he cannot be found it may be served on his attorney. A demand is not necessary in addition to the service of the order requiring him to pay. (*Fraser* agt. *Raab et al.*, ante, 218.)
2. Of demurrer by mail — when served on last day under suspicious circumstances, what must be shown. (*See Green* agt. *Howard*, 14 Hun, 434.)

SHERIFF.

1. Liability of, for escape of prisoner held under non-imprisonment act of 1831 — where proceedings in bankruptcy have been commenced against the prisoner. (*See Maas* agt. *O'Brien*, 14 Hun, 95.)
2. In an action against a sheriff for neglecting to collect and return an execution, plaintiff must show a valid judgment upon which the execution was issued.
A sheriff cannot, however, in such an action, take advantage of a mere irregularity in a judgment, rendering it voidable but not void. (*Forayth* agt. *Campbell*, 15 Hun, 235)
3. To prove the existence of a judgment upon which the execution was issued, plaintiff produced a certified copy of an order for judgment, made by the county court, directing the reversal of a judgment of a justice of the peace, and directing judgment for the defendant (the present plaintiff) for his costs, twenty-seven dollars and twenty-six cents, the amount of the alleged judgment:
Held, that this was not sufficient to prove the existence of a valid judgment. (*Id.*)
4. Where a deputy sheriff levies upon the goods of the judgment debtor, and the latter, in order to prevent the closing of his store, agrees that a keeper shall be employed, and that he will pay for his services, such agreement is, if in all respects just and fair, a valid one, and capable of being enforced by the sheriff. (*Murtugh* agt. *Conner*, 15 Hun, 488.)
5. The words "by color of office," in the act prohibiting the taking of security by the sheriff, includes only such acts as are usually done by the countenance of an officer, and necessarily imply that the act is unlawful and unauthorized, and that the legal right to take the se-

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curity is a mere color or pretense. (*Id.*)

6. Upon an attachment issued in this action, the sheriff seized certain property; by consent of the parties interested an order was obtained providing that the sheriff should proceed to sell by an auctioneer named, "and hold the proceeds thereof in the same manner as the property sold subject to the existing rights of all parties therein." In pursuance of the order the sheriff sold and rendered his account, which was settled save as to items charged for auctioneer's fees, which were objected to as excessive:

Held, that an order was proper taxing the items and requiring the sheriff to pay over the difference between the amount so allowed on taxation and that retained, although the money did not actually come into his hands; that it was to be presumed that he assented to the order naming the auctioneer, as neither the court nor the parties could compel him to employ an auctioneer, or could name one whom he should employ without his consent; that the auctioneer was his agent, and for moneys coming into the hands of such agent he was responsible; and that this was a proper case for taxation under the provision of the statute on that subject (2 *R. S.*, 652, *sec.* 1). (*Griffin* agt. *Helmbold*, 72 *N. Y.*, 437.)

7. Also, *held*, that there having been no agreement for the compensation of the auctioneer, the sheriff had no right to allow beyond the two and one-half per cent fixed by statute (1 *R. S.*, 532, *sec.* 23). (*Id.*)
8. Also, *held*, that it was not error for the general term, on appeal from an order of special term denying a motion so to charge the sheriff, to make such an order as should have been made by the special term. (*Id.*)

SPECIAL PROCEEDING.

1. A petition brought under chapter 838 of 1858 to vacate an assessment in the city of New York, is not a special proceeding within the meaning of chapter 270 of 1854, relating to costs. (*See Matter of Jetter*, 14 *Hun*, 93.)

SPECIAL TERM.

1. The F. and M. Bank of Rochester, holding a note for \$1,000, made by S. & M. Hutchins, delivered the same to Stewart, one of the directors, who recovered a judgment in his own name for \$1,140 damages and twenty-two dollars and eighty cents costs, which costs Stewart claimed to have paid to his attorneys. This action was brought by the assignee in bankruptcy of the bank against Stewart and the sheriff, to compel the latter to pay over the whole amount of the judgment (\$1,162.80), which he had collected and held in his hands. The case was tried before a justice of the supreme court, without a jury, and judgment was entered in favor of the plaintiff, September 15, 1877, directing the whole amount to be paid to him. No evidence was given upon the trial to show that Stewart had paid the twenty-two dollars and eighty cents to his attorney. Upon a motion made by defendant, after the entry of the judgment, it was ordered by the judge before whom the action was tried that the judgment be amended so as to direct that, as to the twenty-two dollars and eighty cents, the plaintiff should hold the same in trust for Stewart, and pay it over to him upon demand:

Held, that the special term had no power to alter the judgment upon motion; that the proposed change related to the merits, and was covered by the decision already made; that, if proper, such change could only be made after a rehearing before the trial judge

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upon the case being sent back to him, or after a review by an appellate court. (*McLean* agt. *Stewart*, 14 *Hun*, 472.)

2. A judgment was entered in this action upon a decision of the general term, allowing the plaintiff to redeem a certain contract therein described, upon payment of the sum of \$15,000, within sixty days from the entry of such judgment, with interest from September 10, 1874, and costs. Subsequently, upon plaintiff's application, an order was made at special term staying all proceedings on the part of the defendants under the judgment until the hearing and decision by the court of appeals of an appeal by the plaintiff, and extending the time to redeem until sixty days after such decision of the court of appeals.

Upon an appeal from this order, *held*, that the special term had power to make it, and that it should be affirmed. (*Gray* agt. *Green*, 14 *Hun*, 18.)

STATE PRINTING.

1. The law to provide for state printing (*chapter 24 of Laws of 1846*) requiring the secretary of state and comptroller to give notice, as prescribed therein, that they will receive bids for printing, and on the expiration of the notice "open said proposals and enter into a contract, or contracts, with such person or firm as shall make the lowest offer or bid to do such printing," and they having made an award, another party claiming that the bid of the successful party was not in accordance with the proposals and that their's was and that they were the lowest bidders, is not entitled to a mandamus directing the secretary of state and comptroller to canvass again the bids received and award the contract to them. (*Weed, Parsons & Co.* agt. *Beach*, *ante*, 470.)

2. Where the law requires, as it does in this matter, that a contract shall be made "with such person or firm as shall make the lowest offer or bid," such bid must substantially conform to the proposals made. (*Id.*)

3. On motion for a peremptory mandamus in this matter:

Held, that the motion should be denied, because,

First. The moving parties present no better claim to the printing than their successful competitor, both bids being informal in matters of substance.

Second. No bidder in his offer followed the proposals. Every bid including those of the applicant was radically defective.

Third. The state officers having endeavored to obtain bids in a certain form and failed were at liberty, as against such faulty bidders, to examine all and according to their best judgment, award the contract to the lowest bidder.

Fourth. A contract to do the printing having been actually made with another party, this court should not, on the authority of *The People ex rel. Belden* agt. *The Contracting Board* (27 *N. Y.*, 378), grant the relief asked for, even though the bid of the applicants was in proper form and lower than that of the party to whom the work was let. (*Id.*)

STATUTE OF FRAUDS.

1. Reliable information as to facts upon which the future price of a stock will depend, is a sufficient consideration to uphold an agreement or contract in relation to such stock. Such information being concededly of great value is just as effective to take the case out of the statute of frauds as if a cash payment had then been made. (*White* agt. *Drew*, *ante*, 58.)

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STATUTE OF LIMITATIONS.

1. The defendant made and filed an inventory of the estate of his intestate; he made a copy, and inserted at the foot thereof copies of two promissory notes, given by him to the deceased, and inclosed the same to his co-administrator, in a letter, saying, "Inclosed I send a copy of the inventory taken yesterday."

Held, that the copies of the notes and letter constituted a sufficient written acknowledgment of the notes to take them out of the statute of limitations. (*Clark* agt. *Van Amburgh*, 14 *Hun*, 557.)

2. The will of H., after a devise of his homestead farm to his son Jonathan, "on the following conditions and proviso," contained among those conditions the following: "I order and direct my said son Jonathan to pay unto my three daughters—Hannah, Eunice and Sarah—four hundred dollars each, which I give and bequeath to them and their heirs forever." After directing the payment of various other legacies by Jonathan, the will provided that the testator's daughters, above named, should live with Jonathan and their mother, and have their support on the farm, they assisting in carrying it on; and that "the money above bequeathed them, be paid one year after they shall severally marry or be inclined to leave Jonathan and their mother, and live elsewhere." Jonathan took possession of the farm under the devise. Sarah and Eunice resided with him until their death, neither having married. Sarah died more than sixteen years before the commencement of this action, brought to recover the legacies; the statute of limitations was pleaded as a bar to a recovery of the legacy to her:

Held, that the cause of action accrued one year after her death; that Jonathan, by accepting the devise, became personally liable

for the payment of the legacies; that the case, therefore, was not one exclusively of equitable cognizance, and the same law of limitation applied as if the action was a legal one; that the case came either within the six years' limitation prescribed by section 91, or the ten years' limitation prescribed by section 97 of the Code; and that the cause of action was barred. (*Loder* agt. *Hatfield*, 71 *N. Y.*, 92.)

3. An action to enforce payment of a legacy is not an action upon a sealed instrument within the meaning of the twenty years' limitation (*sec. 90, sub. 2*). (*Id.*)
4. As to whether the rule formerly prevailing in equity, by which no statute of limitations was applicable to suits in equity for certain causes of action, still exists under the Code, *quære*. (*Id.*)

STAY OF PROCEEDINGS.

1. Section 779 of the Code of Civil Procedure, providing that when the costs of a motion directed to be paid are not paid as therein prescribed, all proceedings on the part of the party required to pay them are stayed, without further direction of the court, does not apply to a motion to vacate the order imposing the costs on the ground of irregularity. (*Marsh* agt. *Woolsey*, 14 *Hun*, 1.)
2. An appeal from a judgment, restraining action on the part of defendant, and a stay of proceedings thereon does not affect the validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution; it acts directly without process, and the stay only operates to prevent action on the part

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of plaintiff. (*Sixth Ave. R. R. Co., agt. Gt. Et. R. R. Co., 71 N. Y., 480.*)

8. It seems, that the supreme court so long as an action is pending therein on appeal from the special to the general term, has power to enforce obedience to its judgments, and a stay of proceedings pending the appeal does not prevent the exercise of this power. (*Id.*)

STENOGRAPHER.

1. Upon the trial of this action before a referee, the attorneys for the respective parties agreed, for convenience, to employ a stenographer to take the minutes, each party to pay one-half of the expenses of his so doing. The defendant having been successful, claimed, upon presenting his bill of costs for adjustment, to be allowed the sum of \$1,847 paid by him to the stenographer:

Held, that the item was properly rejected by the clerk; that such item was not a disbursement within the meaning of the law regulating the adjustment of costs. (*Colton agt. Simmons, 14 Hun, 75.*)

2. In ascertaining whether the additional allowances granted by the surrogate of New York exceed the limit of \$2,000 fixed by section 309 of the Code, an amount awarded to the court stenographer is not to be considered; such amount is a disbursement in the case, and not in the nature of costs. (*Down agt. McGourkey, 15 Hun, 444.*)

STILWELL ACT.

See MARINE COURT (N. Y.).
People ex rel. Lowenbein agt. Donohue, ante, 152.

1. The marine court of the city of New York is a court of record, and a justice thereof has power to

issue a warrant for the arrest and commitment of a party in proceedings under the act of 1831, to abolish imprisonment for debt. (*People ex rel. Lowenbein agt. Donohue, 15 Hun, 418.*)

STOCK.

1. Reliable information as to facts upon which the future price of a stock will depend, is a sufficient consideration to uphold an agreement or contract in relation to such stock. Such information being concededly of great value is just as effective to take the case out of the statute of frauds as if a cash payment had then been made. (*White agt. Drew, ante, 58.*)
2. One who offers a reward for information is bound by his contract to the person who responds to his offer. The same rule applies with equal force where the information is proffered by one and accepted by another under a contract by him to carry certain stocks for the benefit and profit of the party imparting the information. (*Id.*)
3. Where plaintiff, being in possession of valuable information in relation to a certain stock which he proposed to impart to defendant upon condition that if defendant should consider it sufficiently important to warrant his acting upon it he (defendant) should hold 5,000 shares of such stock at cost for plaintiff's account, and at his risk and subject to his orders, for a period of sixty or ninety days, to which defendant assented and thereupon plaintiff imparted said information which defendant accepted and acted upon, pronouncing it the best "point" he had heard of in a long time:

Held, that the moment the information was given and the transaction assented to by defendant it was an executed contract and the defendant bore the same

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relation to the plaintiff, in regard to this stock, as stock brokers ordinarily bear to the customers for whom they are carrying stocks. (*Id.*)

4. The plaintiff became the owner and the defendant the pledgee of the stock, charged also with the further duty to continue to carry without margin until directed to sell as provided by the agreement. (*Id.*)
5. The title to the stock (5,000 shares) was in the plaintiff and he was entitled to an immediate delivery at any time of the specific stock agreed to be set apart and held by defendant for him, on tendering to the defendant the price agreed upon for the same, with accrued interest. (*Id.*)

STREET OPENINGS.

1. The provision contained in chapter 86, Laws of 1813, regulating the opening of streets, avenues and public places in the city of New York that commissioners of estimate and assessment shall not allow compensation for any building erected, in part or in whole, upon any street, avenue, public square or place laid out upon the map or plan of the city, after the filing of the map, does not conflict with section 6 of article 1 of the Constitution, which provides that private property shall not be taken for public use without just compensation. (*Matter of One Hundred and Twenty-second Street, ante, 60.*)

SPECIAL TERM.

See INSURANCE (LIFE).

Attorney-General agt. Atlantic Mutual Life Insurance Company, ante, 391.

SUBSTITUTION OF ATTORNEY.

1. As a general rule, when the right of an attorney to use the name of a plaintiff is questioned by the *opposite party*, if the attorney be a reputable member of the bar, the court will not, unless the action be one for the recovery of land, require proof of the authority to be produced; but the right of the court to require its production in all cases is undoubted, and it will be exercised when, in its judgment, the ends of justice demand it. (*Stewart agt. Stewart, ante, 256.*)
2. Where an attorney has instituted a suit in which the name of a party appears as one of the plaintiffs, and his right so to do is challenged by the party whose name is used, he (the attorney) must affirmatively establish such right. The burden of proof rests upon the attorney. (*Id.*)
3. Where the authority of an attorney to bring an action for the recovery of the possession of real estate adversely held is questioned by a party whose name appears as one of the plaintiffs, the attorney must produce a "written request of such plaintiff or his agent to commence such action," or a "written recognition of the authority of the attorney to commence the same." (*Id.*)
4. Evidence as to the pretended authority of the attorney fully considered, and, *held*, that it did not show any authority what ever from the plaintiff, either *verbal* or *written*, to use his name; nor has the said plaintiff, in any way, since ratified such use. (*Id.*)
5. The court has the power, even where there has been an original employment, upon good cause being shown, to remove an attorney from charge of the action and

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to substitute another in his place.
(*Id.*)

6. Where an attorney has willfully made a misstatement in the body of his complaint, and undertaken to deceive his opponent and the court alike upon a matter which might, for certain purposes in the administration of justice, as he supposed, be material, and permitted his client to verify the complaint which contained the falsehood by him knowingly inserted:

Held, that for such an act as this it would be entirely competent for the court to remove the attorney. (*Id.*)

7. Where the evidence showed that the attorneys more than doubted the justice of their cause; that the action was commenced with a falsehood willfully inserted in the first pleading; that their hope of success was in a forced settlement; that a detective in the service of their adversaries was "bought over," as they supposed, to their interests; and by his treachery, as they hoped, the fears of parties interested in upholding the will were to be so worked upon as to secure \$100,000:

Held, that the attorney who thus seeks to carry on a litigation should be stopped by the mandate of the court. (*Id.*)

SUMMONS.

See JUDGMENT DEBTOR.

Leonard agt. *Leonard*, ante, 97.

1. An order for publication of a summons, after reciting that it appeared from the affidavits that the party to be served was a necessary party defendant, that he could not after due diligence be found within the state, but had departed therefrom, and that his present place of residence could not, after such diligence used, be ascertained, directed that the summons

be served upon him by publication thereof in two papers there specified, once in each week for six successive weeks, and by mailing copies of said *summons and complaint*, properly inclosed in a sealed wrapper, addressed to said defendant at his last place of residence, West Eighty-third street, near Eighth avenue, in New York, said publication and mailing to be commenced within three months from the date:

Held, that the order was void because (1) it did not require a copy of the *order*, as well as of the *summons and complaint*, to be served; (2) because it did not specify the post-office in which they were to be deposited; (3) because it not require them to be mailed on or before the day of the first publication. (*McCool* agt. *Boller*, 14 *Hun*, 78.)

2. In a suit for a divorce, a valid judgment, *in personam*, may be rendered against a defendant, not during the progress of the suit within the territorial jurisdiction of the court rendering it, provided that be the place of his citizenship and domicile, though process be served on him only in some method prescribed by the law of that jurisdiction, as a substitute for personal service, and though he has not voluntarily appeared; and such judgment is effectual to dissolve the marriage contract, and will be prevalent and effectual everywhere. (*Baker* agt. *People*, 15 *Hun*, 256.)

3. *Semble*, that such judgment would have the same effect where the defendant was not a citizen of, or domiciled within, the state giving jurisdiction to the court, and especially where the marriage sought to be annulled was celebrated therein. (*Id.*)
4. Reargument ordered as to the effect of a general verdict upon an indictment containing several counts, one of which cannot be

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sustained, by reason of facts established by the defense upon the trial. (*Id.*)

5. August 9, 1858, a summons was issued against the defendants, Angell and Mackey, on which Angell indorsed the following admission: "I admit due personal service of a copy of the within summons, August 9, 1858. E. D. ANGELL." August 31, 1858, a judgment was entered in the supreme court against both defendants on a joint liability. In a proceeding to enforce the judgment against Mackey, the court at special term decided that the judgment was void because of defects in the admission of service:

Held, that it was immaterial that the admission was of the service of a copy of the summons, instead of the summons itself. (*Maples* agt. *Mackey*, 15 *Hun*, 533.)

6. That the admission showed sufficiently the time when the service was made, viz.: August 9, 1858. (*Id.*)
7. That no proof of the genuineness of the signature of Angell being required by the Code, its absence would not render the judgment valid. (*Id.*)
8. That the judgment being that of the highest court of original jurisdiction, the fact that the admission did not show the place of service did not render the judgment void. (*Id.*)

SUPERINTENDENT ALBANY PENITENTIARY.

See ATTACHMENT.

Matter of Pilsbury, ante, 290.

SUPERIOR COURT (N. Y.).

See NATURALIZATION.

Matter of Christern, ante, 5.

SUPERVISORS.

See ATTACHMENT.

Matter of Pilsbury, ante, 290.

SUPPLEMENTAL COMPLAINT.

1. May be served to revive suit in equity, brought to prevent the cutting of timber. (*See Johnson* agt. *Eheood*, 15 *Hun*, 14.)

SUPPLEMENTARY PROCEEDINGS.

1. An assignee of a judgment has the right to maintain supplementary proceedings on it, after the death of the party recovering the judgment. (*Urill* agt. *Kornmeyer*, ante, 276.)

2. Where it appeared that the owner of the judgment was B., and that it was assigned to him by the plaintiff in his lifetime, it also appearing that the plaintiff in the action was dead:

Held, that the court could appoint a receiver of the property of the defendant on the application of the assignee. (*Id.*)

3. A county judge has jurisdiction in proceedings supplementary to execution based on judgments recovered in the supreme court where the judgment debtor resides or has a place of business in the county, or where a transcript has been filed when the judgment was not recovered in that county. (*Id.*)

4. The provisions of Rule 25 that "whenever an application is made *ex parte* for an order the affidavit shall state whether any previous application has been made for such order, and if made to what court or judge, and what order or decision was made thereon," was not intended to apply to orders in supplementary proceedings, or if

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intended to apply to them such intent is inoperative. (*Schanek agt. Conover, ante, 437.*)

5. On motion to set aside an order for the examination of a third party on proceedings supplementary to execution, it appeared by the affidavit on which such motion was based, that, upon an affidavit showing the necessary facts two orders had previously been made by a county judge that the same party appear before a referee to be examined as to the same matters in October, 1878, and the hearing of one had been adjourned to November second, said party had not been examined under either of said orders, nor had either been continued by adjournment after that date. No formal discontinuance of proceedings has been made or notice of discontinuance given:

Held, that upon the failure of the party to appear at the adjourned day the plaintiff had the right to continue the same proceedings before the county judge by another order from him in continuation of such proceedings, or he might elect to commence new proceedings by an order, *de novo*, from the same or another judge, and that such election was an abandonment of the former proceedings and a new order would be valid. (*Id.*)

6. Where an order is made, under section 297 of the Code of Procedure, directing the payment by a third person of money belonging to the judgment debtor, the latter cannot be heard to object to such order. (*Chandler agt. City of Fon du Lac, ante, 449.*)

7. In an action against a foreign corporation whose property is attached under the provisions of the Code, which corporation does not appear therein, an order may be made requiring a third party indebted to or having property of such corporation and attached in

such action to pay the same to the plaintiff on account of such judgment. (*Id.*)

8. On May 14, 1877, the defendant appeared before a referee, duly appointed in supplementary proceedings instituted in this action, and, after having been partially examined, refused to answer certain questions put to her by the plaintiff; the proceedings were then adjourned until May twenty-first, on which day plaintiff appeared, but defendant did not. On November 7, 1877, on plaintiff's application, an order was made, on the return of an order to show cause why the defendant should not be committed for a contempt in refusing to answer the questions, requiring the defendant to appear before the referee and be examined, and continuing the injunction already granted. Upon an appeal from this order, *held*, that the delay of the plaintiff to institute the proceedings to punish the defendant for a contempt did not constitute an abandonment of the supplementary proceedings, and that the order was proper and should be affirmed. (*Stanley agt. Lovett, 14 Hun, 412.*)
9. Where, in a supplementary proceedings instituted by a judgment creditor, an injunction is served upon the debtor, and a person holding property belonging to him, and such proceedings are subsequently abandoned before the appointment of a receiver therein, the lien acquired by the judgment creditor upon such property is lost, and is not revived or continued by the commencement of an action, in the nature of a creditor's bill against the debtor, the person who held the property, and one to whom it was subsequently transferred. (*Ballou agt. Boland, 14 Hun, 855.*)
10. Although an ordinary bill of exchange or check on a bank does

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not operate as an equitable assignment of so much money, so as to vest the title in the payee without acceptance; yet, when a particular fund, out of which the amount is payable, or the source from which the money is to be derived, is specified, the order operates, with or without the acceptance of the drawee, as an equitable assignment of the fund, or so much thereof as is necessary to satisfy the draft; and so operating, it transfers the fund, so that the drawee, having notice of the draft, is bound to keep the fund, as upon a special deposit in his hands for the benefit of the payee. (*Id.*)

11. One who had taken a contract to build a school-house sublet the mason work to one Boland, and thereafter drew the following draft upon the person who was to pay for the school-house: "Please pay to James Boland two hundred and forty-nine dollars (\$249), being the balance due on contract for building said school-house, the above amount to be paid on the acceptance of the said school-house."

Held, that the draft operated as an equitable assignment of so much of the fund as was necessary to pay the same. (*Id.*)

12. Although section 298 of the Code confers upon a county judge, at chambers, the power to appoint a receiver in proceedings supplementary to execution, yet, with the appointment, his authority over him ceases, and the receiver is thereafter subject to the control of the court in which the judgment was obtained; or, if the judgment was upon a transcript from a justice's court, filed in the county clerk's office, the receiver is subject to the control and direction of the county court. (*Pool* agt. *Safford*, 14 *Hun*, 369.)
13. A receiver appointed in supplementary proceedings, under section 292 of the Code, is vested

with the real estate of the debtor by virtue of his appointment, the filing of the security required, duly approved, and the entry and recording in the proper clerk's office of the order of appointment, without any conveyance being made to him by the judgment debtor. (*Wing* agt. *Disse*, 15 *Hun*, 190.)

14. A county judge has power to accept the resignation of a receiver in supplementary proceedings and to appoint his successor. (*Id.*)

SUPREME COURT.

1. The supreme court, in special proceedings pending before it for the purpose of distributing the effects of a dissolved corporation, *i. e.* (a life insurance company), (pursuant to chapter 463, Laws of 1853, and chapter 902, Laws of 1869), has power to enjoin an action brought by a policyholder of such corporation against the receiver appointed in such special proceedings for the purpose of ascertaining and declaring the debts and obligations of the corporation, and for the distribution of its assets. (*Attorney-General* agt. *North American Life Insurance Co.*, *ante*, 160.)
2. A motion by the receiver to stay such suit need not, of necessity, be made in the district where the action is pending. (*Id.*)
3. Even where an action is pending in one district and a suit is brought in another to restrain it, the court may interfere in the latter district. (*Id.*)
4. The jurisdiction of the court to interfere is undoubted where the case is pending in one district, and on a second suit being brought in another, for the same purpose, the party who is thus sued moves in the first action to stay the second. (*Id.*)

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5. The fact that the proceeding first instituted is not an action *eo nomine*, makes no difference. As the court has power in this proceeding to distribute the assets of the dissolved corporation, it will enjoin and restrain any individual who seeks by a new and unnecessary action to deprive it of its power. (*Id.*)
 6. A proceeding to wind up and dissolve a corporation and distribute its effects was specially provided for by the act (*Laws of 1853, chapter 463, section 11*), and consequently, no action can now be maintained by a creditor or a stockholder under the Revised Statutes for a similar object. What a creditor or a stockholder could not do before the attorney-general and the court have acted under the statute of 1853, it ought not to be allowed to do after such action (*See Attorney-General agt. Continental Life Insurance Company, 53 How., 16.*) (*Id.*)
 7. Under the Revised Statutes, when an action had been brought to dissolve and distribute the assets of an insolvent corporation, the remedy of every creditor was in that suit and proceeding only, and in the district in which the same was pending, and the same rule applies in proceedings to dissolve and distribute the assets of an insolvent corporation under the act of 1853. (*Id.*)
 8. Where an order has been granted by a judge of the supreme court allowing a suit to be brought against a receiver upon its being made evident that such order was improvidently granted, there is no impropriety in another judge directing an order to be entered withdrawing the consent to bring such suit. It was the consent of the same court which was obtained, and it can properly be withdrawn by the same tribunal which granted it though sitting now in another district (*See McArdle agt. Barney and others, 50 How., 97.*) (*Id.*)
- See AWARD.*
Decastro agt. Brett, ante, 484.
9. The entire original jurisdiction by petition, over assignments for the benefit of creditors, is conferred, under chapter 466 of 1877, as amended by chapter 818 of 1878, upon county courts, and the supreme court has no original jurisdiction over them. (*See Matter of Nicholas, 15 Hun, 317.*)
- SURETY AND CO-SURETY.**
1. Where a creditor, whose claim against the sureties is valid, commenced an action against them upon an undertaking given on appeal from a judgment, and pending the action, one of the sureties paid the judgment to the creditor, at the request of his co-surety, upon his promise to reimburse him one-half the amount:
Held, that the surety who paid the creditor, relying upon such promise, could recover of his co-surety one-half of the judgment, notwithstanding that the law firm of the surety, to whom the promise was made, had procured the judgment to be marked secured on appeal, without notice to the co-surety, the surety himself, at the time he paid the judgment, being ignorant of the irregularity in the order. (*Vide Green agt. Milbank (8 Abb. N. C., 138)* where facts are stated. (*Green agt. Milbank, ante, 382.*)
 2. A surety has the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contributions, as a creditor has in behalf of sureties. (*Id.*)
 3. *Flemming agt. Waterhouse (40 Superior Court R. [8 J. & S.], 424)* distinguished. (*Id.*)

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4. A surety who has paid to his co-surety his proportion of the claim of the creditor, which was in judgment, is entitled to be subrogated to the creditors' right to enforce the judgment out of the property of the judgment debtor, upon which it was a lien, and to follow land conveyed away by the judgment debtor, notwithstanding an order marking the judgment secured on appeal, the order being, as to the creditor and the surety, irregular and void. (*Id.*)

5. The effect of a voluntary payment made by a surety of a debt barred by the statute of limitations as void for usury or other cause, considered. (*Id.*)

See SURVIVORSHIP.

Randall agt. *Sacket*, ante, 225.

6. A judgment having been recovered by plaintiff in an action to foreclose a mortgage, the appellants who were defendants therein, being in possession of the premises, appealed from the judgment and procured a stay of proceedings by furnishing an undertaking, executed by two sureties, conditioned to pay the rents and profits and waste that might accrue during the pendency of the appeal. The plaintiff having been successful, brought this action against the sureties to the undertaking, and the appellants, who were not parties thereto; the complaint alleging facts showing that the liability of the sureties had become fixed:

Held, that as the appellants were not parties to the undertaking, they were not liable to the plaintiff for a breach thereof, and that as to them the complaint did not contain facts sufficient to constitute a cause of action. (*Delancey* agt. *Stearns*, 14 *Hun*, 50.)

7. The plaintiff and Davies, Jones and Beckwith entered into an agreement for the dissolution of

a partnership existing between them, which provided that the assets of the firm should be collected or sold, and the proceeds applied to the payment of the debts, and that if any deficiency should arise, one-fourth should be paid by plaintiff, and three-fourths by the other three. This action was brought, to recover three-fourths of a note which plaintiff had been compelled to pay, against the defendants, who had signed an instrument guaranteeing that Davies, Jones and Beckwith would perform all the stipulations on their part contained in the agreement for dissolution.

Upon the trial, the plaintiff showed that, in the absence of the defendants, he, together with Davies, Jones and Beckwith, had examined the books of the firm and determined that a deficiency existed, and the amount thereof; that he had given his check for one-fourth thereof, and received a receipt from them showing that he had done so; and that subsequently he had been compelled to pay the note, to recover a portion of which this action was brought;

Held, that the examination of the books of the principals, the determination of a deficiency, and the giving of the check and receipt, in the absence of the sureties, were inadmissible to prove a deficiency against them. (*Horn* agt. *Perry*, 14 *Hun*, 409.)

SURVIVORSHIP.

1. A cause of action in favor of a husband against a railroad company for the loss of services of his wife who was injured while in the act of getting off the cars, while a passenger, through the negligence of the company, survives and may be revived and continued in the name of the administrator. (*Oregon* agt. *Brooklyn Cross Town Railroad Co.*, ante, 82.)

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2. The cause of action is for a wrong done to "the property, rights or interests" of the husband and survives to his personal representatives. (*Id.*)
3. There is nothing necessarily retrospective in section 758 of the Code of Civil Procedure; and the provision, that "the estate of a person or party jointly liable on contract with others shall not be discharged by his death," applies only to future contracts. (*Randall* agt. *Sacket*, ante, 225.)
4. Previous to the adoption of this section of the new Code the rule was that where the contract was that of sureties and joint, upon the death of one of such sureties his estate was absolutely discharged. (*Id.*)
5. The rule as to the primary liability of the survivor is not changed by this section. "It is not in the power of the legislature to extend the obligation. Nor will such an intention be imputed to the legislature if it can be avoided. (*Id.*)"
6. It might be necessary to bring in the representatives where the survivor was *insolvent*, and the plaintiff asked to proceed against them as in equity, or where the action was originally of an equitable character, or where the liability was several as well as joint, but where the action could not have been brought against the survivor together with the personal representatives of the deceased, that is, as an ordinary action at law, without an averment of inability to procure satisfaction from the survivor, it would be improper to substitute and join as defendants the executor of a deceased party. (*Id.*)
7. Under the provisions of 2 Revised Statutes (*page 447, secs. 1 and 2*) a cause of action which a husband has against a railroad company for the loss of services of his wife,

who was injured while in the act of getting off their cars while a passenger, through the negligence of the company, survives and may be continued by the personal representative of such husband (*Affirming*, *S. C.*, ante, 32). (*Oregon* agt. *Brooklyn Cross Town Railroad Co.*, ante, 465.)

SUSPENSION OF THE POWER OF ALIENATION.

See WILL.

Gano agt. *McCunn*, ante, 337.

TAXES AND ASSESSMENTS.

See MORTGAGE FORECLOSURE.

Poughkeepsie Savings Bank agt. *Winn*, ante, 365.

TRADE-MARK.

1. In a suit to restrain the use of trade-marks alleged to be simulated, if it appears by the testimony that the marks used by the defendants, though resembling those of the plaintiffs in some respects, have not deceived and are not likely to deceive the ordinary mass of purchasers paying the attention which such persons usually do in buying the article in question, an injunction will not be granted. (*Hurricane Patent Lantern Co.* agt. *Miller & Co.*, ante, 234.)
2. Where the alleged imitation by the defendants of the plaintiff's trade-mark consisted, among other things, in the directions for the use of the article, which directions were identical with those printed on the plaintiff's label:
Held, that this did not constitute an infringement of the plaintiff's trade-mark.
Held, also, that the words "*tempest*" and "*hurricane*" are not to be regarded as so similar as to warrant the conclusion that the

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public is liable to be misled into believing that the articles to which these words are applied are of the same manufacture. (*Id.*)

TRIAL.

1. In an action for breach of covenant by landlord to rebuild, a sublease by the tenant was offered and received in evidence upon the trial, without objection, and no motion was made to strike it out. The court was requested by defendant's counsel, but refused to charge that it could not be taken into consideration on the subject of damages:

Held, no error; that it was proper to be considered upon the question as to the rental value of the premises. (*Ganson agt. Tift*, 71 N. Y., 49.)

2. It appeared that there was an association of the owners of elevators, formed for the purpose mainly of regulating the prices, to whom at times the elevators were all leased. The court was requested, but refused, to charge that in determining the amount of damages, the jury must not take into consideration any future profits, or enhanced value of the lease arising from such association:

Held, no error; that the additional value of the lease, arising from the formation of the association, was a proper subject for consideration by the jury, although the association was illegal, it not appearing that G., had any connection therewith; that the real question was, what was the unexpired term worth under all the circumstances, and the character of the association was not a subject for consideration. (*Id.*)

3. It is the province of a jury not only to pass upon conflicting evidence, but where different inferences may be drawn from evidence or from the conduct of

parties to draw the inferences. (*Powell agt. Powell*, 71 N. Y., 71.)

4. Plaintiff held a promissory note for \$1,000, made by defendant, payable in ten years without interest. Defendant owned a stock of goods estimated to be worth \$4,000, which he agreed to sell to his son, plaintiff's husband, for \$3,000, if he would procure and surrender the note. Plaintiff, with knowledge of the purpose for which it was required, gave the note to her husband who delivered it to defendant; the latter immediately tore his name from the note, repudiated the agreement, and required plaintiff's husband to pay \$4,000, for the goods. In an action for a conversion of the note the court charged the jury, that if they were satisfied defendant obtained the note from plaintiff fraudulently, they should find in her favor:

Held, no error; that the circumstances authorized an inference that defendant obtained the note with the preconceived design to destroy it, without using it for the purpose for which plaintiff parted with it; and if so, the action was maintainable; that no demand was necessary; and that plaintiff was entitled to recover the present value of the note. (*Id.*)

5. In an action against a telegraph company to recover for injuries sustained by the falling of one of its posts, the evidence tended to show that the accident was occasioned by a snow storm of unusual severity; there was evidence also from which the jury could have found that the line, as originally constructed, was sufficient for such storms as could have been reasonably expected. The court was requested, but refused, to charge that defendant was not bound so to make or manage its line as to guard against storms of unusual severity, the

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occurrence of which could not be reasonably expected.

Held, error. (Ward agt. A. and P. Tel. Co., 71 N. Y., 83.)

6. In an action to recover possession of certain property, the products of a farm, of which farm plaintiff was conceded to be the owner, defendant claimed title by virtue of a sale under an execution against plaintiff's son who cultivated the farm, using the farming implements, teams and live stock belonging to his father. Plaintiff introduced in evidence a written instrument, executed by himself and son, by which the latter agreed to work the farm, the products to belong to plaintiff until he had realized \$600 therefrom, and until full performance of the agreement on the part of the son, the balance then to belong to the latter "as his pay in full for working said farm." It was claimed by defendant that the instrument was not executed at its date, but was "an instrument made as a device or fraud." The court charged that the son being in possession and working the farm must be presumed, to be the owner of the products, unless it was shown that some lease was in existence; "that the fact that it was the plaintiff's farm would not make the products his, unless there was something tending to establish the fact that this lease is intended to establish."

Held, error. (Rawley agt. Brown, 71 N. Y., 85.)

7. The rights of parties to a legal action must be determined as they existed at the commencement of the action. Although an equitable defense is allowed, it does not, when interposed, change the character of the action, or authorize transactions subsequent to the commencement to be shown to affect those rights. (*Wiener agt. Ocumpaugh, 71 N. Y., 118.*)

8. The father of a married woman

advanced \$4,000 toward the purchase of a farm for her, upon her promise that the same should be repaid in case of her death during an approaching confinement. This action was brought against the executor of the deceased daughter to recover an advance and against her husband, to whom she had devised the farm, the complaint asking that the advance should be charged as an equitable lien upon the farm. There was no demand by defendants for a jury trial. The complaint was dismissed as to the husband, and judgment for the amount of the advance was rendered against the executor:

Held, no error; that as the complaint presented a case of equitable cognizance, the court obtained jurisdiction, and could although the plaintiff failed to establish his right to a lien, give judgment for breach of promise, payable out of the property of the testator in due course of administration. (Herrington agt. Robertson, 71 N. Y., 280.)

9. It is not strictly proper to refer to the testimony of a witness, and ask the court to charge that if the jury believe the witness they must find in a certain way, or that a certain conclusion follows, as it prevents the jury from determining what facts are established by the witness' evidence. (*Dolan agt. Pres't, etc., D. and H. C. Co., 71 N. Y., 285.*)

10. Where the evidence of a witness for the defense in an action for negligence is not so specific and certain as necessarily to establish, as matter of law, negligence — either that defendant was not, or that plaintiff was guilty of negligence — a refusal of the court to charge that if they believe the testimony of the witness they must find for defendant, is not error. (*Id.*)

11. The bringing of an action of a

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distinctly equitable character is a waiver, so far as the plaintiff is concerned, of the right of trial by jury, although upon the facts he may be entitled to either legal or equitable relief; and in determining the mode of trial, the court may, as to him, be governed by the nature of the action, as stated in the complaint. (*Davison agt. Associates J. Co.*, 71 N. Y., 334.)

12. *It seems*, that the rule as to the defendant is different; that he cannot be deprived of a jury trial, in a proper case, because the plaintiff has demanded equitable, instead of legal, relief. (*Id.*)

13. Defendant indorsed certain notes for the accommodation of D. which were discounted by plaintiff. In an action upon the indorsements defendant offered to show that plaintiff in its dealings with D. took upon discounts made for him more than lawful interest:

Held, that as the offer embraced transactions with which defendant was not connected, it was too broad, and so was properly rejected. (*First National Bank agt. Wood*, 71 N. Y., 405.)

14. Whether one offered as an expert is qualified to speak as such is a fact preliminary to his testifying, to be determined by the court upon the trial. (*Nelson agt. Sun Mut. Ins. Co.*, 71 N. Y., 454.)

15. In an action to recover damages for injuries to plaintiff's canal boat, alleged to have been caused by defendant's negligence, plaintiff claimed, and his evidence tended to show, that two of defendant's tug-boats, in consequence of being improperly moored and fastened to a wharf, broke loose in the night-time and drifted down upon plaintiff's boat, doing the damage complained of. Defendant's evidence tended to show that its tugs did not in fact strike plaintiff's boat, and it was claimed

that if they did, they were broken from their mooring by floating ice, without negligence on the part of defendant. After the court had charged that defendant was liable only for negligence, and that if the jury found that the tugs did come down on the boat they must further inquire if there was negligence in making them fast, it charged that, if the tugs became loosened from their moorings and come down on plaintiff's boat, defendant was chargeable with this negligence. This was excepted to:

Held, no error; that the intent was, not to charge that the mere fact that the tugs became loosened and came in contact with plaintiff's boat was sufficient to establish negligence, but simply that if the jury found such fact, then defendant was chargeable, provided they found it guilty of negligence in mooring the tugs. (*Carpenter agt. East T. R. Co.*, 71 N. Y., 574.)

16. Subsequently, at the request of defendant's counsel, the court charged that if defendant's tugs came down against plaintiff's boat and were forced to do so by pressure of ice, which could not have been avoided by the exercise of care and prudence, there could be no recovery.

Held, that if there could have been any possible misunderstanding on the part of the jury of the charge excepted to, it was removed. (*Id.*)

17. In an action against a railroad corporation for negligence, the court charged the jury that "the company does not contract to insure the safety of its passengers but contracts to use the utmost diligence and care in protecting them from injury;" *held*, no error; that the last clause was limited by the first, and the charge was simply that defendant was bound to use great care and diligence. (*Tabor agt. D. L. and W. R. R. Co.*, 71 N. Y., 439.)

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18. The court is not bound to accept the words of a counsel, and so to charge when it has in other and appropriate language given to the jury the true rule by which they are to be governed. (*Morsehouse* agt. *Yeager*, 71 N. Y., 594.)
19. Where in case tried by a jury there is no motion for a nonsuit or exception to charge the verdict is final as to facts. (*See Mumby* agt. *Jackson* [Mem.], 71 N. Y., 599.)
20. The complaint in an action against a railroad corporation for negligence alleged that three men entered defendant's car, and, with violence and great force, assaulted plaintiff who was a passenger, and robbed him of certain bonds. No injury to the person was alleged. Judgment was asked for the amount of the bonds, with interest. The inquiry upon the trial was confined to the loss of the bonds; and the court, in its charge, only presented that question, directing the jury, in case they found for plaintiff, to find "the value of the bonds and interest," as stipulated between counsel. No suggestion or request was made on the part of plaintiff that the question of bodily harm should be submitted. Defendant's counsel moved to dismiss the complaint, on the ground that "the injury and grievance is too remote to charge the defendant with damages," and that, "under the circumstances of the case, plaintiff has no legal ground for a recovery." *Held*, that the motion sufficiently presented the question that there was no evidence upon which the court should submit to the jury whether plaintiff was entitled to recover for the bonds; that this was the only question for the jury; and that the motion should have been granted. (*Weeks* agt. *N. Y., N. H. and H. R. R. Co.*, 72 N. Y., 50.)
21. Where upon the trial of an action after plaintiff has opened his case, the complaint is dismissed on the ground that it does not state facts sufficient to constitute a cause of action, and plaintiff, without asking leave to amend, excepts to the decision and appeals, the complaint will be treated as if it had been demurred to, and the sole question presented on appeal is whether it sufficiently states a cause of action. (*Sheridan* agt. *Jackson*, 72 N. Y., 170.)
22. Plaintiff's complaint alleged, in substance that he was entitled to the rents and profits of certain premises; that in an action between the other defendants, who claimed, as between each other, some interest in the premises, defendant C. was appointed receiver of the rents and profits, and a large amount thereof came into his hands, which plaintiff had demanded, but C. refused to pay over. Plaintiff demanded that C. account; that he be restrained from paying over the moneys so received by him to any other person, and that he be required to pay the same into court, or to plaintiff, or to a receiver and for judgment, adjudging plaintiff to be entitled to the same. The complaint was dismissed on plaintiff's opening on trial: *Held*, no error; that the complaint did not state facts showing plaintiff to be entitled to the rents and profits; nor did it show any right in the plaintiff to intervene in the litigation between the defendants as there was no allegation that they claimed in hostility to him, or that could be in any way damaged by such litigation. (*Id.*)
23. Where, upon trial before a referee, his decision upon objections to evidence is reserved, and no exception to the mode of treatment is taken, an objection to it cannot be considered upon appeal.

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(*Holden* agt. *N. Y. and Erie Bank*, 72 *N. Y.*, 287.)

24. It is not error for a referee to refuse to allow a witness to show the results derived from his examination of books of account, where it does not appear that it requires expert testimony to ascertain the facts offered to be shown by the witness; while he may allow a witness with the books before him to give a summary of their contents, this is discretionary with him. (*Von Sachs* agt. *Kretz*, 72 *N. Y.*, 548.)

25. Although a person on trial for a criminal offense by taking the stand as a witness may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party; his counsel may speak for him while he is a witness, and an error committed by the court against him may inure to his benefit as a party. (*People* agt. *Brown*, 72 *N. Y.*, 571.)

26. *It seems* that the cross-examination in such case should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses. (*Id.*)

27. Upon the trial of an indictment the prisoner, while a witness in his own behalf, was asked upon cross-examination: "How many times have you been arrested?" This was objected to by his counsel upon the ground among others, that it tended to degrade the witness, and he was privileged from answering. The objection was overruled:

Held, error; that the objection was valid, was properly taken by the prisoner's counsel, and that the exception to the ruling was available to the prisoner as a party. (*Id.*)

28. One of plaintiff's attorneys was called as a witness in his behalf and gave material testimony.

Upon cross-examination he testified that his compensation depended in some degree upon the result of the action. He was then asked "to what extent?" This was objected to and objection sustained:

Held, no error. (*King* agt. *N. Y. C. and H. R. R. Co.*, 72 *N. Y.*, 608.)

29. The extent of a cross-examination upon a collateral issue, as to the credibility of the witness is in the discretion of the court, and its holding is not the subject of review unless there is an abuse of discretion. (*Id.*)

30. Upon an issue as to identity, a witness may testify to opinion or belief. (*Id.*)

31. When motion of party in whose favor erroneous evidence has been released to strike it out, does not cure error. (*See Furst* agt. *Second Ave. R. Co.*, 72 *N. Y.*, 542.)

TRUSTEE OF AN EXPRESS TRUST.

1. Where the defendant and his wife entered into articles of separation whereby the defendant agreed with her and plaintiff, as her trustee, that defendant and his wife should live separate and apart, and in consideration of the premises defendant, among other things, agreed to pay, or cause to be paid, to the plaintiff, as such trustee, twenty-five dollars per week for the support and maintenance of his wife, the trustee covenanting and agreeing with the defendant to indemnify and bear him harmless from all debts of said wife contracted, or to be contracted, by her or on her account, each of the parties being bound by mutual covenants to carry out the agreement; in an action by the trustee against the husband to recover the sum of

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\$3,825 balance of unpaid weekly installments:

Held, that the contract with plaintiff was for the benefit of another and constituted him a trustee of an express trust within the meaning of section 449 of the Code of Civil Procedure. He alone would be liable to the husband for the wife's breach of covenants, and the action is properly brought in his name. (*Dupre agt. Rein, ante*, 238.)

2. In articles of separation between husband and wife, through the intervention of a trustee, the covenant on the part of the husband to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy. (*Id.*)

3. A complaint in such an action which simply sets forth the agreement *in extenso* and declares a breach of it for failure to pay is not good pleading. As the law only tolerates such an agreement when it can be enforced by a third person acting in behalf of the wife, all facts, by way of inducement, should be pleaded to enable the court to decide whether or not a *prima facie* case is presented. (*Id.*)

UNDERTAKING.

1. When upon an appeal to the court of appeals from a judgment of the general term, money is deposited in court in lieu of an undertaking, such deposit is subject only to the decision of the appeal to which it relates, and upon the reversal of the judgment the fund is released from all liens except those created by judgment or assignment.

The plaintiff is not entitled, on showing that the defendant who made such deposit is insolvent, to have the money held as security for the payment of any judgment

he may recover on a new trial. (*Jordan agt. Volkening*, 14 Hun, 118.)

2. The undertaking to be given on the granting of a temporary injunction must conform, in terms or in substance, to the requirements of the Code (*sec. 222*), and the liability of the sureties is according to those terms. (*Palmer agt. Foley*, 71 N. Y., 106.)

3. There is no breach of the condition of the statutory undertaking, unless the court finally decide that plaintiff was not entitled to the injunction, or unless something occurs equivalent to such a decision. (*Id.*)

4. A discharge in bankruptcy of a judgment debtor pending an appeal from the judgment, does not release the sureties to an undertaking, in the form required to stay execution, given upon the appeal. (*Knapp agt. Anderson*, 71 N. Y., 466.)

5. It seems, that such an undertaking is not included in the provision of the bankrupt act (*section 83, U. S. R. S., section 5118*), declaring that no discharge granted under the act shall release one liable with the bankrupt for the same debt, as surety or otherwise; this only applies to sureties liable for the debts of the bankrupt existing before, and which would be discharged by the bankrupt proceedings, while the sureties to the undertaking do not become liable for the debt of their principal, and it does not become a debt until the happening of the contingency *i. e.*, the affirmance of the judgment or dismissal of the appeal. (*Id.*)

6. A complaint in an action upon an undertaking on appeal given in pursuance of section 348 of the old Code, which fails to allege "service of notice on the adverse party of the entry of the order or judgment affirming the judg-

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ment appealed from," ten days before the commencement of the action, is defective; the notice is a condition precedent to the commencement of the action, and in the absence of the allegation the complaint does not state a cause of action. (*Porter* agt. *Kingsbury*, 71 *N. Y.*, 588.)

7. Where an undertaking given under the old Code (*sec.* 187) to procure the discharge of a defendant from arrest was, by its terms, simply a joint obligation, not joint and several; *held*, that upon the death of a surety thereto, his estate was absolutely discharged, both at law and in equity, and the surviving obligors only were liable. (*Davis* agt. *Van Buren*, 72 *N. Y.*, 587.)

8. The provision of the Civil Code (*sec.* 1308), authorizing an appellate court to require the appellant to file a new undertaking, in case of the insolvency of one of the sureties, is not imperative; if the remaining surety is solvent and abundantly able to satisfy the judgment, or if the judgment is otherwise well secured, and the appeal is likely to be heard and disposed of without delay, the court may, in its discretion refuse the order. (*Doring* agt. *Metcalf*, 72 *N. Y.*, 618.)

VENUE.

1. An order denying a motion to change the place of trial, for the convenience of witnesses, is appealable to the general term. (*Macdonald* agt. *Macdonald*, 14 *Hun*, 496.)

VERDICT.

1. Upon a motion to set aside a verdict for irregularity on the part of jurors, it appeared that, after the adjournment for the day, the jury, having been charged, occupied the court-room, and found there

the minutes kept by the justice holding the court; some of the jurors read portions of the minutes and commented thereon, and others attempted to do so, but were unable to make them out. The minutes did not contain all the testimony, nor were they used by consent of counsel:

Held, that the verdict subsequently arrived at was properly set aside for this irregularity. (*Mitchell* agt. *Carter*, 14 *Hun*, 448.)

2. Where, in an equity case, specific questions of fact have been submitted to the jury, under the direction of the court, and no motion for a new trial has been made upon the judge's minutes, or at special term upon a case and exceptions, a party appealing from the judgment will be deemed to have acquiesced in the verdict, and the questions of fact involved therein cannot be reviewed on appeal. (*Ward* agt. *Warren*, 15 *Hun*, 800.)

3. What facts are sufficient to notify the owner of a lot, over which an easement is alleged to have been acquired by prescription, of the claim of the person acquiring the same thereto, considered. (*Id.*)

VERIFICATION.

1. A copy of the summons and a verified complaint were served upon two of the defendants herein, and an unverified complaint on the third. The defendants served an unverified joint answer:

Held, that, as their interests were several, this could not be done, and that the two defendants upon whom the verified complaints were served must serve verified answers. (*Wendt* agt. *Peyser*, 14 *Hun*, 114.)

WILL.

1. S. made his will in 1871, disposing of his entire estate; in 1872 he executed a codicil making a dif-

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ferent disposition of personalty to the amount of \$50,000; in 1876 he burned the codicil with the intention of revoking it; he then held the will of 1871 in his hand and declared in the presence of two witnesses: "This is my last will and testament, I shall never make another;" wrote a direction to his executors referring to the will as his last will, inclosed it and the will in an envelope and wrote upon it: "The last will of William Simpson, dated August 18, 1871;" sealed the envelope so that it could not be opened without detection, and carefully preserved it among his valuable papers until his death. Upon proceedings being taken by the next of kin within one year after its probate to contest its validity and the competency of its proofs. *Held:*

(1.) That in proceedings to prove a will the surrogate has power to inquire whether a subsequent testamentary instrument has not been executed revoking the will propounded, even though such subsequent will may have been lost or destroyed.

Such power is necessarily implied in the jurisdiction given to the surrogate to determine whether the instrument submitted for probate is the *last* will of the testator.

(2.) Where a codicil impliedly revokes a will in part, by reason of inconsistent provisions, the destruction of the codicil *animo revocandi*, revives the provisions of the will revoked by its execution.

Such a codicil is not a "second will" within the provisions of section 51, 3 Revised Statutes (6th ed., p. 65), which declares that the destruction of a "second will" shall not, *ipso facto*, revive a former will.

(3.) Where a second will is revoked by destroying it, acts and declarations of the testator accompanying the destruction, evincing an intention to revive

and give effect to a former will, are not sufficient for that purpose unless they amount to a republication of the former will.

(4.) A parol republication of a revoked will, if made in the presence of two witnesses, is valid. (*Matter of Simpson, ante*, 125.)

2. Re-execution and reattestation are not necessary. (*Id.*)

3. Prior to the Revised Statutes a will of personalty in this state and in England could always be republished by parol. It was otherwise with respect to a will of lands, which, after the statute of frauds (29 Car., 2, c. 3), could not be republished except by an instrument, in writing, attested by three witnesses. Nor was any particular form of words required to constitute a good publication of any will, or a republication of a will of personalty. (*Id.*)

4. Any thing which indicated a present intention on the part of the testator that the instrument should operate as his will was sufficient. (*Id.*)

5. The Revised Statutes have so far changed this rule as to require in the case of all wills a parol declaration of the testator in the presence of two witnesses that the instrument signed by him is his last will and testament and to that extent only have modified the requirements necessary to constitute a valid publication or republication of a will. (*Id.*)

See ADMINISTRATORS.

Lucas agt. *Brunges, ante*, 282.

6. Where a testator, who died leaving a wife, brothers and sisters, by the fifth clause of his will devised his real and personal estate to his wife, as executrix, and two other persons as executors in trust, to take possession of the same and collect the rents, issues and profits thereof, and out of the proceeds

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of the same, for six years after his death, to pay certain bequests to his wife, brothers and sisters the balance of the income, after paying such bequests, to be applied in the payment of any incumbrances or taxes on said property; at the end of six years the executors were directed to sell, and dispose of, all his estate, both real and personal, the proceeds of the same to be divided amongst his heirs and next of kin as directed:

Held, that the said clause in the will of the testator is void, because it suspends the power of alienation in a manner, and for a term, prohibited by the statute, and that the property, sought to be disposed of, thereby descends to the testator's heirs at law as if he had died intestate. (*Gano* agt. *McCunn*, ante, 337.)

7. No absolute term, however short, can be maintained. Hence, a bequest of his real and personal estate directing that the issues and profits shall be applied to certain beneficiaries, for six years after the testator's death, and that then the same shall be sold and the proceeds divided among his heirs and next of kin, is void. (*Id.*)
8. The testator attempted, by means of a trust to receive rents and profits, to render his lands inalienable, for the term of six years from the time of his death. This he could not do as the statute forbids it, and the whole trust estate and the remainder limited upon it, are consequently void. (*Id.*)
9. Nor can the provision be upheld by a resort to the doctrine of equitable conversion. The rule of equitable conversion of real into personal or personal into real estate, does not operate until the time arises when the conversion is directed to take place, which, in this case, would be six years from the death of the testator. (*Id.*)
10. Where a testator in the opening

sentence of his will, in view of a dangerous voyage upon which he was about to enter, declared that he deemed it his duty to make a will "*for the benefit and protection of my wife and children*," who are named, and then in one connected sentence in his will disposes of his property and appoints an executor in these words: "I do, therefore, make this my last will and testament giving and bequeathing to my wife, Caroline, all of my property, real or personal, of whatever name or nature it may be in, that I am now possessed of or is owned by me, &c., &c., and do appoint my wife, Caroline, my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named:"

Held, that the gift to the mother was not absolute, but that the children had, with their mother, a substantial interest in the property which a court of equity would recognize and protect. (*Clark* agt. *Jacobs*, ante, 520.)

11. Words in the opening clause of a will, as all other material parts, are to be considered in construction (*Youngs* agt. *Youngs*, 45 N. Y., 254). (*Id.*)
12. Precatory expressions in a will have been construed as creating a trust where the objects to be benefited were well described, and the property, to which the trust should attach was sufficiently defined. (*Id.*)
13. *Lambe* agt. *Eames* (L. R. [6 Chy. App.], 597) and *Markett* agt. *Markett* (L. R. [14 Eq.], 49; 8 C. 2 Eng. R., 412) distinguished. (*Id.*)
14. *Taggart* agt. *Murray* (58 N. Y., 288) and *Smith* agt. *Bowen* (35 *id.*, 83) applied. (*Id.*)

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WITNESSES.

1. Action by a receiver, in behalf of a judgment creditor, to set aside, as fraudulent, a conveyance from a mother to her daughter, and to collect out of the real estate so conveyed, a judgment recovered against the mother, which real estate the mother inherited from her father. The judgment was for a debt contracted by the mother for goods purchased by her. The father died intestate January 25, 1875. The conveyance was made after the debt upon which judgment was recovered was contracted. The consideration for the conveyance was one dollar. The mother and daughter were both allowed to testify at the trial in their own behalf. The mother testified: "I had a conversation with my father January ten or twelve, and before he was taken sick, on the subject of his property, in which he said he wished me to give to my daughter Cora my share of the property. What part he gave to me *he wanted me to give it to Cora*, if it was given to me, what part was to come to me; said nothing about a will at that time, nothing else was said; I said I was willing to convey it to her, and did do it." Cora, the daughter, testified that she was present when the conversation took place between her grandfather and her mother and corroborated her mother as to the conversation. Some of the goods were bought before the death of the grandfather. The defense is that the conveyance was made in pursuance of the direction of the grandfather; that the mother was an equitable trustee of her father and considered herself equitably bound to execute such trust according to the request and direction of the father:

Held, that, the mother and daughter were competent witnesses in their own behalf. They were not called to speak of transactions and communications had

with a *deceased* person against his administrator, executor, heir at law, next of kin, assignee, devisee or survivor of such deceased person (*Code, sec. 399*). (*Champlin agt. Seiber, ante, 48.*)

2. Where upon the examination of a witness in proceedings supplementary to execution, the testimony actually given has been erroneously taken down, the witness has a right to have the minutes changed so as to conform to the testimony actually given by him, and the court has no power to compel him to subscribe his name to a statement which is not strictly true, even though its falsity be shown by a supplementary entry in the minutes. (*Sherwood agt. Dolen, 14 Hun, 191.*)
3. A party cannot call witnesses to contradict statements made by an adverse witness, in answer to questions asked on cross-examination, simply for the purpose of impeaching him. (*Kobbe agt. Price, 14 Hun, 55.*)
4. When, after a jury has been impaneled and a witness sworn, one of the defendants is ordered to be tried separately, the witness as well as the jury must be resworn. (*See Babcock agt. People, 15 Hun, 347.*)
5. A party who presents a witness thereby asserts or admits his credibility; and while such party may show his witness to have been mistaken, he cannot impeach or assail him. (*Pollock agt. Pollock, 71 N. Y., 138.*)
6. The rule that the evidence of a paragon or other accomplice is to be listened to with caution, and should be corroborated, only applies when the witness admits the criminality alleged, not where such witness appears only in obedience to process and denies any criminality. (*Id.*)

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7. Although a person on trial for a criminal offense by taking the stand as a witness may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party; his counsel may speak for him while he is a witness, and an error committed by the court against him may inure to his benefit as a party. (*People agt. Brown*, 72 N. Y., 571.)
8. *It seems* that the cross-examination in such case should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses. (*Id.*)
9. Upon the trial of an indictment the prisoner, while a witness in his own behalf, was asked upon cross-examination: "How many times have you been arrested?" This was objected to by his counsel upon the ground, among others, that it tended to degrade the witness, and he was privileged from answering. The objection was overruled:
- Held*, error; that the objection was valid, was properly taken by the prisoner's counsel, and that the exception to the ruling was available to the prisoner as a party. (*Id.*)
10. Although a party is not incompetent under section 399 of the old Code to testify to an independent conversation between the deceased and a third person, yet if he participated in the conversation and it related to a transaction between him and the deceased, he is incompetent. (*Kraushaar agt. Meyer*, 72 N. Y., 602.)
11. Accordingly, *held*, where in the course of a business transaction between plaintiff's testator and defendant M. the deceased made certain statements to V., who was engaged in drawing up papers between the parties in regard to such transaction, and which statements were in reference to it, that M. was incompetent to testify thereto. (*Id.*)



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Ex. 2. 1/2

ERRATA.

In foot note to *Stewart et al. agt. Munroe et al. (ante, page 197)*, in second line after the words "New York" read "1858," and in next line for "action" read "act."

In the case of *Lalor agt. Dunning (ante, page 210)*, eighth line from top for "Davidson" read "Davison."

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